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Supreme Court, U.S.
FILED

No. 94-52 JUL - 7 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

KEVIN BLAKE, SEAN BROGAN, MARY KELLIHER, JOHN D. McCARTHY AND MORTIMER O'SHEA,
Petitioners,

v.

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC., COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In this action brought under the Massachusetts Civil Rights Act, in which the Respondents had to prove that the Petitioners, nonviolent demonstrators, threatened, intimidated or coerced women seeking abortions, did the Court violate Petitioners' due process rights by elevating clinic patients' rights to privacy above Petitioners' rights to a fair trial and ruling that Petitioners could not learn the identity, or ask questions in discovery or at trial, of the women whom they allegedly threatened, intimidated or coerced?

2. Does an injunction barring the Petitioners from "trespassing on, blocking or in any way obstructing access" to abortion facilities impinge on protected First Amendment activity because it is overbroad and vague and will chill expression of opposition to abortion at abortion clinics?

PARTIES TO THE PROCEEDINGS

In addition to the Petitioners listed in the caption, Operation Rescue: Boston, Pro-Life Action Network of Arlington, Barbara Bell, Timothy Biggins, Timothy Brigham, Rachel Cann, Shirley Clifton, Sean Corrigan, William Cotter, Claire Croghan, Robert Delery, Denise Duda, James Dudley, Robert Filos, Darroline Firlit, Francis Haggerty, Bruce Hendon, Lawrence Howe, Michelle LaPlume, Joseph Manning, Peter Marleau, Jean Marshall, Richard McCarthy, Anne McNamara, Bruce Murch, Adeline Murray, James Myette, Andrew Olsson, Brian Phaneau, Fred Pulsifer, Philip St. Jean, Russell Saulnier, Andrew Singer, Jr., Robert Souza and Catherine Wommack were defendants in the Superior Court of Massachusetts, Middlesex County and had judgment entered against them, but did not appeal. None of the Petitioners are active corporations.

In addition to the Respondents listed in the caption, Preterm, Inc., Repro Associates, Inc., Crittenton Hastings House, Stanton P. Goldstein, M.D., and Rebecca Roe were plaintiffs in the Superior Court of Massachusetts and had judgment entered in their favor. The Supreme Judicial Court reversed and vacated the trial court's decision in favor of Rebecca Roe and dismissed the action as to her. Barry Adler, d/b/a Gynecare, was a plaintiff in the Superior Court and had judgment entered in his favor, but did not appear or argue in the Supreme Judicial Court. League of Women Voters of Massachusetts, Massachusetts National Organization for Women, Mass. Choice, and Religious Coalition for Abortion Rights were plaintiffs in the Superior Court and had judgment entered against them, but did not appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Kevin Blake, Sean Brogan, Mary Kelliher, John D. McCarthy and Mortimer O'Shea respectfully petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts, entered in that court on May 13, 1994.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported at 417 Mass. 467 (1994) and is reproduced herein as Appendix A.

The Amended Judgment of the trial judge of the Superior Court of Massachusetts, Middlesex County, was not reported, but is reproduced herein as Appendix B. The resulting Amended Permanent Injunction was not reported, but is reproduced herein as Appendix C.

STATEMENT OF JURISDICTION

Trial judge Peter Lauriat of Middlesex Superior Court entered an Amended Judgment on October 28, 1991, holding that certain defendants, including Petitioners, had violated MCRA. The trial judge then entered an Amended Permanent Injunction on October 28, 1991, barring those defendants from, *inter alia*, obstructing access to any abortion facility in Massachusetts. Thereafter, on May 13, 1994, the opinion of the Supreme Judicial Court of Massachusetts was entered upholding the injunction. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part: "No

State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

This case also involves the First Amendment to the United States Constitution (incorporated by the Fourteenth Amendment to apply to states as well), which provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ."

In addition, this case involves the Massachusetts Civil Rights Act ("MCRA"), G.L. c. 12, §§ 11H-11I, which, in pertinent part, prohibits:

> any person or persons . . . [from] interfer[ing] by threats, intimidation or coercion, or attempt[ing] to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States. . . .

STATEMENT OF THE CASE

This case challenges the constitutionality of the denial of the Petitioners' efforts to learn the identities of and to question during discovery and at trial those women whose civil rights they allegedly violated.

This case was commenced on April 10, 1989, by ten plaintiffs, including Massachusetts clinics which provide abortion services; membership organizations; a doctor who claims to provide abortion services; and a Rebecca Roe, identified as a fictitious person representative of all women seeking abortions at plaintiff clinics. Their Complaint named 79 defendants, including individuals and organizations. Approximately one year later, the Commonwealth of Massachusetts intervened as a plaintiff as well. The plaintiffs and plaintiff-intervenor filed a

Joint Amended Complaint on October 15, 1990, alleging a single count against 87 defendants, including the Petitioners: that they had violated MCRA by sitting in front of or inside certain abortion clinics on certain dates, thereby delaying or preventing abortion services for women seeking abortions on such dates at those clinics. The Joint Amended Complaint alleged that the defendants' actions interfered with women's constitutional right to abortion services by means of threats, intimidation or coercion.

During discovery, the defendants, in order to learn relevant facts to defend against plaintiffs' claim, sought the identities of those individuals whom the defendants had allegedly threatened, intimidated or coerced. The defendants propounded interrogatories to all plaintiffs which specifically asked plaintiffs to identify the women who were threatened, intimidated or coerced by the defendants, *i.e.*, those who were prevented from receiving abortion services. Document requests were also served on the clinics asking for documents which identified the women scheduled for appointments on days of rescues.

Plaintiffs refused to provide this information, arguing, *inter alia*, that the information sought was confidential. On August 17, 1990, the defendants filed a motion to compel responses to these requests. Rather than compelling plaintiffs to provide the information under a protective order keeping the women's identities confidential, the Middlesex Superior Court judge denied defendants' motion to compel. Defendants appealed to the Single Justice of the Appeals Court, who denied relief and refused to report her decision to the Full Bench. A further petition to the Single Justice of the Supreme Judicial Court of Massachusetts was also denied.

As trial approached, defendants made further attempts to find out whose civil rights they had violated. The defendants issued subpoenae to clinics asking that the clinics produce records identifying the individuals who were prevented by the

defendants from receiving abortion services. Plaintiffs moved to quash the subpoenae. The trial judge granted this motion.

Despite their inability to find out the identities of women who allegedly had their civil rights violated, defendants sought means to depose these women even without their names. The trial court entered a protective order which would have allowed defendants to depose only those women, hand-picked by plaintiffs, who would testify at trial, but preventing the defendants from learning any identifying information such as name, address, and the like. The only woman who was going to testify refused to appear at her deposition and did not testify at trial. Defendants thus were unable to depose any women with whose rights they allegedly interfered.

In short, the defendants made every effort to seek discovery prior to trial of and from key witnesses in this action — women who allegedly were threatened, intimidated or coerced by the defendants' actions. As the parties stipulated in their Joint Pe-Trial Memorandum:

> g. Defendants in discovery have sought the identities of women who were scheduled to receive services at the clinics on the days in question and plaintiffs have declined to produce them.
>
> h. One Jane Doe, who was identified by plaintiffs as a woman who was allegedly seeking abortion services at incident (1), and who had earlier agreed to testify pursuant to protective order, declined to appear at deposition and will not testify at trial. Defendants had no opportunity to take discovery against Jane Doe.

At trial, defendants continued to seek identities of people whose civil rights were allegedly violated. For each incident

about which testimony was offered, defendants asked that records be produced that provided this information, but the trial judge upheld the plaintiffs' refusal to provide the records. Again, the trial judge refused to allow defendants to call the women as witnesses while keeping their identities confidential.

The evidence at trial was undisputed as to the basic facts of the case: that on ten dates in 1989, 1990 and 1991, certain of the defendants sat down, with linked arms or joined together by Kryptonite bicycle locks, in front of doors to various abortion clinics or inside abortion clinics, and remained there until removed by police officers, causing abortion services to be prevented or delayed. The trial court made no findings that violence was involved in any of the protests. *See* Appendix to Appellant's Brief in the Supreme Judicial Court, Volume II, p. 525 (hereinafter, A., *Vol., p.*). The police officers and clinic staff, called as witnesses by plaintiffs, admitted that the protesters were nonviolent, and among the most nonviolent protesters they had seen. A., IX, 1595-1596, 1685-1687, 1724-1727; VII, 1867, 1871; IX, 2354, 2398, 2430. The photographs and videotapes taken by police and plaintiffs of many of the protests at issue show unequivocally that the protesters were not violent, indeed were passive, and merely sat in place praying until removed by police. (A., III, 575-578, 581-587, 591, 616, 620, 634, 638-639.

In order to support a finding that defendants' actions "threatened, intimidated or coerced," as required by MCRA, the trial court relied on evidence presented by plaintiffs concerning the "reaction" of women to defendants' protests. The court found that patients at each of the protests in issue experienced "emotional reactions" to the protests which included crying, shaking, and appearing "frightened" and "upset." As previously set forth, the defendants objected to this evidence because of their inability to obtain discovery from any of the alleged patients who experienced such reactions. Yet the court

cited no evidence of any physical or verbal threats at any time, by any defendant, to any alleged patient.[1]

The trial judge entered judgment against forty defendants (including the Petitioners) and in favor of all plaintiffs except the four membership organizations. Judgment entered under MCRA on October 17, 1991, and was amended on October 28, 1991, which enjoined defendants and those in active concert or participation with them from:

a. trespassing on, blocking or in any way obstructing access (either ingress or egress) to any facility in the Commonwealth which provides abortion counselling or services; or

b. physically restraining or obstructing or committing any acts of force or violence against persons entering, leaving, working at or seeking to obtain services from any facility in the Commonwealth which provides abortion counselling or services; or

c. directing, instructing, conspiring with and/or aiding or abetting directly or indirectly any person, persons, groups or organizations who engage in any of the acts described in paragraphs (a) and (b) above.

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[1] For example, there was *no* evidence that any alleged patient was ever struck by any defendant; *no* evidence that any patient was ever physically harmed by any of the defendants; *no* evidence that any alleged patient was ever threatened by a defendant; *no* evidence that any defendant ever made a threatening gesture or movement toward any patient. Indeed, there was *no* evidence that any defendant ever even said *anything* to any alleged patient while "blockading" a clinic. In fact, evidence was affirmatively presented, *by plaintiffs' witnesses*, that the defendants *did not* do any of the above, but rather sat until removed by police. A., IV, 1069-1070, 1085-1086, 1095-1096, 1103; VI, 1584, 1591-1592, 1594, 1686, 1689, 1728, 1790-1791; VII, 1930; VIII, 2047; IX, 2353-2354, 2427-2428; X, 2612-2613, 2682, 2742-2744, 2748; XII, 2993-2994.

Further amendment to the judgment was denied on November 13, 1991. The defendants herein (Kevin Blake, Sean Brogan, Mary Kelliher, John D. McCarthy and Mortimer O'Shea) appealed the judgment on January 13, 1992.

The Supreme Judicial Court of Massachusetts ("SJC") granted a request for direct appellate review and affirmed the trial court's judgment.[2] *Planned Parenthood League of Massachusetts, Inc.* v. *Blake*, 417 Mass. 467 (1994). The SJC rejected the defendants' claim that they were deprived of due process or a fair trial by the trial judge's denial of their efforts to identify the patients with whose rights they allegedly interfered. The court reasoned that, "[a]lthough the defendants' relevancy contention is theoretically sound, in the circumstances of this case it lacks practical plausibility." *Id.* at 477. The SJC thought it was implausible because of its perception that it was "unlikely" that any women would have provided the defendants with favorable testimony. *Id.* Furthermore, the SJC emphasized, the "intrusion into the privacy rights of these women would have been substantial." *Id.* at 478. Thus, the SJC ruled that the defendants were not entitled to learn the identities of these women, but, instead, could be found liable for threatening, intimidating or coercing women without ever having the opportunity to question them or even know who they were.

The SJC also rejected the defendants' claim that the Amended Permanent Injunction was constitutionally impermissible. *Id.* at 481. Judges O'Connor, Nolan and Lynch dissented, reasoning that clauses (a) and (c) of the injunction were overbroad. The dissent noted that these clauses impermissibly chilled conduct protected by the First Amendment, as they could be construed to prohibit the hindrance of access to clinics by nonphysical confrontation on public ways. *Id.* at 482-83, citing *Planned*

[2] There was one exception to the SJC's affirmation of the trial court: the SJC reversed and vacated the trial court's decision in favor of plaintiff Rebecca Roe and dismissed the action as to her.

Parenthood League of Massachusetts, Inc. v. *Operation Rescue*, 406 Mass. 701, 721-722 (1990) (O'Connor, J., dissenting).

The federal questions at issue in this petition were raised before both the trial judge and the SJC. The defendants briefed and argued extensively before the SJC that their inability to call women seeking abortions as witnesses had deprived them of due process. They had argued this same point on numerous grounds before the trial court. The SJC's opinion rejected the due process argument.

Similarly, the issues of unconstitutional overbreadth and vagueness were raised both at the trial court level and before the SJC. On May 21, 1990, the trial court entered a preliminary injunction similar to the permanent injunction now in place.[3] The defendants argued that the preliminary injunction was vague and overbroad in Defendants' Memorandum of Law in Support of Petition that Preliminary Injunction Be Vacated, Annulled or Suspended, July 31, 1989. On appeal to the SJC, the appellants again briefed and argued the issues of vagueness and overbreadth, this time with regard to the Amended Permanent Injunction. The SJC's opinion rejected this argument.

REASONS FOR GRANTING THE WRIT

The SJC decided an important question of federal law which has not been, but should be, settled by the Supreme Court: whether and to what extent the right to privacy outweighs a de-

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[3] The preliminary injunction enjoined the defendants, and those in active concert or participation with them, from:

a. trespassing on, blocking or in any way obstructing access (either ingress or egress) to any facility in the Commonwealth which provides abortion counselling or services; and

b. physically restraining or obstructing or committing any acts of violence against persons entering, leaving, working at or seeking to obtain services from any facility in the Commonwealth which provides abortion counselling or services, until further order of this Court.

fendant's due process right to cross-examine witnesses with key information. The scope and importance of the ruling in this case reaches far beyond the state of Massachusetts and the present context of protests at abortion clinics. The SJC's ruling creates a precedent which allows Massachusetts and other states to uphold discovery and trial procedures which deprive a defendant of due process and a fair trial, in the name of protecting a plaintiff's right to privacy. A writ of certiorari should issue to resolve this question, both to remedy the SJC's denial of due process and a fair trial to the defendants by holding them liable under MCRA for peaceful protests when they were not permitted to face and question their accusers, and to provide direction for the people and courts of our nation.

Moreover, the proceedings below, sanctioned by the SJC, have so far strayed from the course of judicial proceedings that this Court must act to correct this abuse. Heretofore, as evidenced in numerous decisions by this Court, a litigant's right to a fair trial has been the cornerstone of the judicial process. If there is a bedrock element to a fair trial, it must be that a defendant is entitled to know the name of and seek discovery from the plaintiff, the person who has made accusations against him. It is unheard of to deny a defendant access to the plaintiff's identity and to rule that a right to privacy is more important than a right to a fair trial. This startling departure from accepted judicial procedure must be remedied.

I. This Case Presents An Important, Unsettled Question Of Federal Law.

A. *The Question Presented Is Unsettled.*

This Court has often addressed the issue of a privacy right to avoid disclosure of personal matters, including in the abortion context. *See, e.g., Thornburgh* v. *American College of*

Obstetricians and Gynecologists, 476 U.S. 747, 766 (1986), overruled on other grounds by *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 112 S.Ct. 2791 (1992); *Bellotti* v. *Baird*, 443 U.S. 622, 644 (1979), *reh'g denied*, 444 U.S. 887 (1979); *Whalen* v. *Roe*, 429 U.S. 589, 598-600 (1977); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 80 (1976). This Court has also addressed the fundamental rights of due process and a fair trial. *See, e.g., Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 829 (1986) (Brennan, J., concurring), quoting *In re Murchison*, 349 U.S. 133, 136 (1955); *Withrow* v. *Larkin*, 421 U.S. 35, 46-47 (1975). However, the present case raises an important federal question which does not appear to have been addressed: what happens when these two rights conflict? Do the defendants, in preparing a defense to allegations that they threatened, intimidated or coerced women, have a right to confront the alleged victims and seek relevant information from them? Or, in the name of privacy, can the defendants be found liable under MCRA and be subjected to fines and prison sentences, without even learning whom they allegedly threatened, intimidated or coerced?

The SJC, when faced with the conflict between these rights, reasoned that the right to privacy superseded a defendant's right to question or even to know against whom he or she had committed a tortious act. Even while admitting that the defendants' argument that the women seeking abortions who were allegedly threatened, intimidated or coerced possessed critical information was "theoretically sound," the SJC denied the defendants' right to discover this information, so as not to infringe on the right to privacy. The SJC's approach threatens to allow the right of privacy to swallow up a defendant's due process rights. The only basis for the decision was the SJC's perception, without even knowing what the women were going to say, that the women would "obviously" not provide any testimony favorable to the defendants. This is a dangerous prece-

dent. Our system of jurisprudence operates on the assumption that our pre-existing prejudices and beliefs are not evidence; that only what the witnesses say is evidence. If the right to privacy allows a judge to prohibit evidence because his prejudices make him believe the evidence will not be useful, the judicial role has been dramatically altered.

This Court has not faced such a set of competing circumstances. There is no guidance for litigants confronted with such a conflict other than the SJC's opinion, which goes too far in protecting privacy rights to the sacrifice of due process.

B. *The Question Presented Is Important.*

A writ of certiorari should be granted because of the importance of this federal question, both for the defendants and for future litigants whose due process rights may also be decimated on the basis of the SJC's opinion.

If the judicial process, criminal *or* civil, harbors a more hallowed right than the right of an accused to know, confront and question his or her accuser, such right does not immediately come to mind. "The elementary principle underlying all trials of whatever nature seems to be that the rule of confrontation shall be applied where the witnesses are available. . . ." *S. Buschbaum & Co.* v. *Federal Trade Comm'n*, 153 F.2d 85, 87 (7th Cir. 1946).[4] That right was denied here because of a per-

[4] *See also Greene* v. *McElroy*, 360 U.S. 474, 496-497 (1959) ("Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases. . . . Professor Wigmore, commenting on the importance of cross-examination, states . . . 'For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. . . .").

ceived supervening right to privacy on behalf of clinic patients. This cannot be. The right to privacy is important and can be preserved by protective orders, the use of pseudonyms in pleadings and the like (all of which the trial court refused to use, instead flatly denying the defendants' right to depose or examine the true plaintiffs). It cannot be used to deprive the defendant of his due process right in order to shield the real plaintiff from being asked highly probative questions by the defendant (*i.e.*, "were you threatened, intimidated or coerced by the defendants?"), as happened here.

The SJC's decision also abandons the principle of discovery of all relevant information. Indeed, the decision does not merely allow the privacy right to impose on the discovery of *some* relevant information. The privacy right serves as an excuse for the SJC to exclude an entire category of witnesses who possess the *most* relevant information: whether the women were threatened, intimidated or coerced by the defendants. Such an unprecedented sacrifice of a defendant's due process rights can now be justified based on the SJC's decision. There is nothing in the SJC's decision to prevent future courts from refusing to allow an accused defendant to inquire into the truth of the accuser's allegations, the accuser's credibility, or indeed even the accuser's very existence. Once a court finds that the accuser's allegations concern a sufficiently delicate topic, the right to privacy can be invoked to obliterate any further exploration regarding the accuser. Such a result would be at the expense of the long-established due process rights of the defendant.

II. The SJC's Decision Violates the Due Process Clause By Depriving the Defendants of a Fair Trial and Preventing Them From Confronting the True Plaintiffs.

Throughout discovery and at trial, defendants sought the identities of the most important witnesses in the case, individuals who are in a sense the real plaintiffs: women who sought

abortion services and were allegedly prevented or delayed from getting those services because of defendants' activities.[5] The identities of such women and information they could have provided were critical to defendants' ability to defend against the claims. Defendants were deprived of due process by their inability to discover this information.

The due process clause of the United States Constitution provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." United States Constitution, Amendment XIV, § 1. Courts have held that "[i]t is fundamental to a full and fair review required by the due process clause that a litigant have an opportunity to be confronted with all adverse evidence and to have the right to cross-examine available witnesses." *Nevels* v. *Hanlon*, 656 F.2d 372, 376 (8th Cir. 1981). *Accord Complaint of Bankers Trust Co.*, 752 F.2d 874, 890 (3rd Cir. 1984) (under Fifth Amendment, "[d]ue process mandates that a judicial proceeding give all parties an opportunity to be heard on the *critical and decisive allegations* which go to the *core* of the parties' claim or defense and to present evidence on the contested facts.") (emphasis in original).[6] *See also Chicago Ridge Theatre Ltd. Partnership* v. *M & R Amusement Corp.*, 855 F.2d 465, 468 (7th Cir. 1988) (due process prohibits court from relying on information where party has no opportunity to cross-examine source of information); *Brouillette* v. *Board of Directors of Merged Area IX*, 519 F.2d 126, 128 (8th Cir.

[5] Indeed, the plaintiffs to this action are not the real plaintiffs and lacked standing to maintain the action. To have standing under Massachusetts law, "a litigant must show that the challenged action has caused the litigant injury." *Slama* v. *Attorney General*, 384 Mass. 620, 624 (1981). The abortion clinics and Dr. Goldstein did not even allege, let alone prove, any injury to themselves and had no standing. (The claims of the remaining plaintiffs were dismissed on this ground.) The SJC should have reversed the judgment against the defendants based on this lack of standing alone.

[6] The requirements of the due process clause of the Fifth and Fourteenth Amendments are identical. *United States* v. *Agurs*, 427 U.S. 97, 107 (1976).

1975) (Iowa statute granting teachers a right to a hearing before termination based on allegations against teachers was "intended to provide non-tenured teachers with procedural due process" which requires, at a minimum, "*notice of both the names of those who have made allegations against the teacher* and the specific nature and factual basis for the charges") (emphasis added); *Casada* v. *Booneville School Dist. No. 65*, 686 F. Supp. 730, 731-732 (W.D. Ark. 1988) (same but decision based directly on Fourteenth Amendment). By refusing to let the defendants know the identities of those making allegations against them, or at least to question them under a protective order or pseudonym, the SJC deprived the defendants of this right.

In *Western Electric Co., Inc.* v. *Stern*, 544 F.2d 1196 (3rd Cir. 1976), *reh'g denied*, 551 F.2d 1 (1976), plaintiff alleged that Western Electric violated Title VII by discriminating against her on the basis of sex. *Id.* at 1197. Plaintiff further alleged that Western Electric had discriminated on a class-wide basis against women and sought certification of a class of women employed at or seeking employment at Western Electric. *Id.* at 1197-1198. Based on these allegations, Western Electric sought discovery from plaintiff of how each member of the plaintiff class was discriminated against by the company. *Id.* at 1198. The court granted Western Electric some discovery on the issue but limited the discovery to evidence "on which [plaintiff] intends to rely during the class stage. . . ." *Id.* The court ruled that, in providing discovery, plaintiff "need not include any information on which she does not intend to rely, even though it might be relevant to Western's defense." *Id.* The Appeals Court reversed and ordered discovery, holding:

> to deny Western the right to present a full defense on the issues would violate due process. Thus, while plaintiffs may make out a *prima facie* case under Title

> VII without introducing evidence on individual cases, at least under some circumstances, defendants must be allowed to present any relevant rebuttal evidence they choose, including evidence that there was no discrimination against one or more members of the class.

Id. at 1199. In our case, plaintiffs similarly alleged they would not rely (although they did) on evidence concerning patients. As in *Western Electric*, that is not enough to prevent defendants from taking discovery. Defendants here should have been allowed to seek discovery from patients and show that these women may not have been "threatened, intimidated or coerced." *See Matter of Extradition of Singh*, 123 F.R.D. 108, 123-126 (D.N.J. 1987) (denial of discovery on crucial issue violated due process).

Defendants were charged under MCRA, which requires the plaintiffs to demonstate that: (1) a person; (2) in the exercise of rights secured by law; (3) was interfered with; (4) by threats, intimidation or coercion. Moreover, in the context of the conduct which occurred here, which included activity protected by the First Amendment, plaintiffs had to prove that any interference with a woman's right occurred through activity which is *not protected* by the First Amendment. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982); *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 97 (1987) ("a person exercising constitutional rights who interferes with another's constitutional rights is not . . . 'interfering with the rights of another person by "threats, intimidation or coercion,'" within the meaning of G.L. c. 12, §§ 11H and 11I."). Yet the defendants were not allowed to confront the women who were allegedly seeking abortion services to inquire, among other things, whether a scheduled abortion was delayed because of the woman's reluctance to encounter marching protesters, re-

luctance to be recognized, reluctance to have people show them pictures or literature, reluctance to go near a place where a crowd had gathered, a change of mind about the morality of abortion, information from clinic personnel or police that abortions were impossible that day or would be delayed due to the protesters, or (the only pertinent reason) because she was "threatened," "intimidated" or "coerced" by the defendants' actions. If due process requires anything, it requires that a defendant be allowed to learn the identity of the plaintiff so that these questions could be asked.

A close analogy concerns the rule that where an informant has information relevant to the defense of a criminal case, the informant's identity *must* be disclosed to the defendant or the case dismissed. For example, in *Roviaro* v. *United States*, 353 U.S. 53 (1957), the Supreme Court reversed a conviction because the trial court had failed to require the government to disclose the identity of an informant to the defendant. This Court noted that although the government had a qualified privilege not to disclose informants' identities, this privilege was limited by:

> the fundamental requirements of fairness. Where the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, *the privilege must give way*. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.

Id. at 60-61 (emphasis added).

The case for disclosure here is much stronger than in the cases cited. The alleged patients had the most crucial evidence in the case. They, and they alone, could testify whether they actually felt "threatened," "intimidated" or "coerced," informa-

tion which ultimately decides whether the defendants are liable under MCRA.[7] Moreover, the reason for the privilege allowing the withholding of an informant's identity is the fear that the informant may not last long on this earth if disclosure is required. If even this fear must give way to the defendant's right to defend himself (and it is not based on the Sixth Amendment but rather on the concept of fairness at trial), the women's alleged or even a legitimate fear of harassment must give way.[8] The defendants herein have been deprived of their due process

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[7] Interestingly, plaintiffs argued and the SJC agreed that the patients' identities were irrelevant because the police officers and clinic personnel who testified about the patients' reactions were subject to cross-examination. In *Roviaro*, the Court specifically held that the ability of the defendant to cross-examine police officers about informer John Doe's activities "was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction." *Rovario*, 353 U.S. at 64.

[8] Any fear of harassment could be addressed by protective orders or the use of pseudonyms. Indeed, the principle that a defendant, in order to defend herself, is entitled to learn who is making allegations against her is further supported by cases in which the plaintiffs have sought to proceed under a pseudonym. In such cases, even where courts have granted the request, they have noted that the defendant maintains a strong interest in knowing who has sued him and is, in fact, allowed to know plaintiff's identity even if the public at large is not. *National Commodity and Barter Ass'n* v. *Gibbs*, 886 F.2d 1240, 1245 and n.2 (10th Cir. 1989) (denying motion to sue under pseudonym and to remain anonymous even to defendant because "[t]o permit this case to progress in this manner would deny the defendants any ability to defend against the claims against them. . . ."); *Lindsey* v. *Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979), *cert. denied*, 444 U.S. 856 (1979) (denying plaintiff's motion to sue under a pseudonym, because, in part, use of pseudonym "may cause problems to defendants engaging in discovery and establishing their defenses. . . ."); *Doe* v. *United Services Life Ins. Co.*, 123 F.R.D. 437, 439 (S.D.N.Y. 1988) (granting motion to sue under pseudonym because, in part, "[defendant] already knows Doe's true identity, [so] it will have full discovery rights as the case progresses, and it will only be barred from using or disclosing the fruits of its discovery for purposes other than the defense of this action."); *Free Market Compensation* v. *Commodity Exchange, Inc.*, 98 F.R.D. 311, 312-313 (S.D.N.Y. 1983) (denying motion despite the fact that plaintiff agreed to provide true identity to defendant's counsel pursuant to protective order preventing defendant from disclosing identity to others); *Doe* v. *Rostker*, 89 F.R.D. 158, 162 (N.D. Cal. 1981) (denying plaintiff's motion to sue under pseudonym noting that "[t]he defendant . . . has a strong interest in knowing who is suing him").

right to a fair trial by the denial of the discovery of the women's identities.[9]

Indeed, the gross unfairness in this case goes beyond anything to be found in the case books. Here the identities of the real plaintiffs were denied defendants in discovery, so no depo-

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[9] Indeed, even the simple but gross disregard of discovery rules and principles by the court in this case is grounds for finding a due process violation. Discovery of all relevant information is the cornerstone of our judicial system in both the federal and state courts. Rule 26(b), Mass. R. Civ. P., like its identical federal counterpart, provides for inquiry into "any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ." Courts have consistently noted that the right to broad and open discovery is a highly valued component of litigation. As the Supreme Court has stated:

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

Hickman v. *Taylor*, 329 U.S. 495, 507 (1947).

In civil rights cases, courts have consistently held that a defendant is entitled during discovery to the names of those individuals whose rights were allegedly violated by the defendant's actions. For example, in *National Org. for Women* v. *Sperry Rand Corp.*, 88 F.R.D. 272 (D. Conn. 1980), NOW brought an action on behalf of its members alleging that the defendant had engaged in discriminatory practices against its women employees and applicants. The defendant sought, through discovery, a list of all members of NOW. *Id.* at 273. NOW objected, claiming that their "privacy rights" would be infringed with harmful employment consequences if disclosure were required. Despite NOW's objection, identical to the one made by these plaintiffs, the court held that NOW was required to divulge the names of those members against whom the defendant had allegedly discriminated. *Id.* at 275. The court noted that the defendant was entitled to this information "in order to prepare an adequate defense" and that, by bringing the suit, plaintiffs had at least partially waived any right to privacy they may otherwise have had. *Id. See also Southern Methodist Univ. Ass'n of Women Law Students* v. *Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979); *United States* v. *School Dist. No. 1, Lexington County, South Carolina*, 40 F.R.D. 391, 393-395 (D.S.C. 1966); *EEOC* v. *St. Francis Community Hosp.*, 70 F.R.D. 592, 595 (D.S.C. 1976).

So clearly was the information sought by defendants relevant, indeed crucial, to their ability to defend that the trial court, in denying the requested discovery, denied the defendants their due process right to a fair trial. The SJC's decision upholding that denial must be reversed. *See, e.g., Westinghouse Electric Corp.* v. *Republic of the Philippines*, 951 F.2d 1414, 1422 (3rd Cir. 1991) (order denying discovery of relevant information requires new trial).

sitions were possible. The denial continued through trial, so defendants could not summon any of these women to testify at trial, deposition or no deposition. Plaintiffs put no clinic patients on the stand at trial, so there was no opportunity even to cross-examine, without preparation, a hand-picked representative. Adding insult to injury, plaintiffs put other witnesses on the stand who testified that they observed patients who were emotionally upset, but: "no, I won't tell you who they were." The SJC's decision offends the Constitution. A writ of certiorari should be granted to remedy this deprivation of due process.

III. The SJC's Decision Upholds A Constitutionally Impermissible Injunction.

The SJC's decision further offends the Constitution in light of the particular wording of the Amended Permanent Injunction. Clause (a) and clause (c), which incorporates clause (a), forbid the defendants and others "in active concert or participation with them" from "trespassing on, blocking or *in any way* obstructing access" to abortion facilities (emphasis added). Yet such broad language goes too far, creating an impermissible chilling effect on the defendants and others acting with them.

A reasonable person wishing to express his views about the morality of abortion and whether abortion should be legal will be chilled from doing so by the language of this injunction. Such an individual cannot be confident that he will not violate the injunction if he merely joins others on a public way near a clinic in order to picket, pray, chant, and exhort others to accept his viewpoint. *Planned Parenthood League of Massachusetts, Inc.* v. *Blake*, 417 Mass. 467, 483 (1994) (O'Connor, J., dissenting), citing *Planned Parenthood League of Massachusetts, Inc.* v. *Operation Rescue*, 406 Mass. 701, 721 (1990)

(O'Connor, J., dissenting). The prohibition against obstructing *in any way* must be construed to include the hindrance of access to clinics by nonphysical confrontation. *Id.*

Such a prohibition encompasses conduct clearly protected by the First Amendment to the United States Constitution. The Amended Permanent Injunction will chill abortion opponents from engaging in protected speech. It will also serve as precedent for future individuals to be subject to similar, impermissible chilling injunctions. A writ of certiorari should issue to correct this unconstitutional injunction.

CONCLUSION

In light of all the reasons stated above, the Petitioners respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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APPENDIX A

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC., & others[1] *vs.* KEVIN BLAKE & others.[2]

Middlesex. December, 7 1993. - April 11, 1994.

Present: LIACOS, C.J., WILKINS, ABRAMS, NOLAN, LYNCH, O'CONNOR, & GREANEY, JJ.

Practice, Civil, Standing. *Abortion. Injunction. Civil Rights,* Availability of remedy, Coercion. *Identification. Words,* "Threats," "Intimidation," "Coercion."

In an action in which the Attorney General had standing to seek injunctive relief under the provisions of the Massachusetts Civil Rights Act, G.L. c. 12, §§ 11H and 11I, it was not necessary for this court to decide whether certain other plaintiffs also had standing. [472]

In an action seeking injunctive relief under the Massachusetts Civil Rights Act, G.L. c. 12, §§ 11H and 11I, the judge, in granting the relief sought, concluded that the defendants' conduct in knowingly trespassing on the property of clinics that provided abortion counseling and services, and in intentionally using their bodies or Kryptonite bicycle locks, or both, to prevent others physically from entering, leaving or using medical facilities to obtain abortions to which they were constitutionally and lawfully entitled, constituted threats, intimidation, and coercion within the meaning of the act and was an actual or potential physical confrontation accompanied by the threat

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[1] Preterm, Inc., Repro Associates, Inc., Crittenton Hastings House, Stanton P. Goldstein, Rebecca Roe, Barry Adler doing business as Gynecare, and the Commonwealth through the Attorney General and as an intervener. The remaining original plaintiffs, except for Rebecca Roe, are providers of abortion services.

[2] Sean Brogan, Mary Kelliher, John D. McCarthy, Jr., and Mortimer O'Shea. None of the other defendants, including Operation Rescue: Boston, Pro-Life Action Network of Arlington, and numerous individuals, has appealed.

of harm; further, the judge was warranted in finding, and correct in ruling, that a reasonable woman seeking abortion services would be made fearful and apprehensive and would feel pressured by the defendants' conduct so that she would desist from seeking those services while that conduct continued. [473-476]

In an action brought under G.L. c. 12, §§ 11H and 11I, the judge properly rejected the defendants' attempts to identify the women affected by the defendants' conduct in "blockading" facilities providing abortion counseling and services, none of whom were called as witnesses by the plaintiffs, where there was no reasonable risk in the circumstances that nondisclosure had prejudiced the defendants' case and where the intrusion on the privacy rights of those women would have been substantial. [476-479]

An injunctive order requiring certain defendants to refrain from "aiding or abetting directly or indirectly" persons who engage in specific prohibited acts was not unconstitutionally vague. [480-481]

O'CONNOR, J., with whom NOLAN and LYNCH, JJ., joined, dissenting, expressed the view, previously expressed in *Planned Parenthood League of Massachusetts, Inc.* v. *Operation Rescue*, 406 Mass. 701 (1990) (*Planned Parenthood I*), that the injunctive relief granted was constitutionally overbroad and should be vacated. [482-483]

CIVIL ACTION commenced in the Superior Court Department on April 19, 1989.

The case was heard by *Peter M. Lauriat*, J.

The Supreme Judicial Court granted a request for direct appellate review.

Francis H. Fox (*Robert A. Miley & Wendy A. Miklus* with him) for Kevin Blake & others.

Judith E. Beals, Assistant Attorney General (*Donna L. Palermino*, Assistant Attorney General, with her) for the Attorney General.

John H. Henn (*Teresa A. Martland* with him) for Planned Parenthood League of Massachusetts, Inc., & others.

Cornelius J.P. Sullivan, for William Cotter & another, was present but did not argue.

Janet Benshoof, Catherine Albisa & Priscilla J. Smith, of New York, for Center for Reproductive Law & Policy, amicus curiae, submitted a brief.

Nonnie S. Burnes & Sarah R. Wunsch, for Civil Liberties Union of Massachusetts, amicus curiae, submitted a brief.

WILKINS, J. The five defendants appeal from an amended judgment that permanently enjoined them, among other things, from obstructing access to any facility in the Commonwealth that provides abortion counseling or services and from using force against persons entering or leaving or working at any such facility.

In April, 1989, the plaintiffs commenced this action pursuant to the Massachusetts Civil Rights Act (MCRA) (G.L. c. 12, §§ 11H & 11I [1992 ed.]).[3] In April, 1990, the Attorney Gen-

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[3]These sections read as follows:

"Section 11H. Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business."

"Section 11I. Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or

eral was allowed to intervene in the name of the Commonwealth. The case was tried on a joint amended complaint stating a single claim under the MCRA and seeking a permanent injunction in accordance with G.L. c. 12, §§ 11H, 11I, & 11J (1992 ed.).[4] In the final judgment the judge dismissed the claims of certain plaintiffs and dismissed claims against many individual defendants. The injunction whose entry is challenged in this appeal was entered against Operation Rescue: Boston, Pro-Life Action Network of Arlington, and numerous individuals, including the five appellants. We allowed the defendants' application for direct appellate review.

The defendants make three substantive challenges to the permanent injunction, which we shall consider in turn after commenting briefly on the standing of the Attorney General and the other plaintiffs to maintain this action. First, however, we set forth certain findings of fact that are typical of the circumstances that led the trial judge to rule that the defendants had violated the MCRA and should be permanently enjoined.

Operation Rescue: Boston and Pro-Life Action Network organized and encouraged participation in what they call "rescues," blockades or invasions of abortion clinics. They offered advice, training, and seminars to prepare participants in "rescues" for arrest, jail, and money judgments. The purpose of a

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laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court."

[4] In *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue*, 406 Mass. 701 (1990), this court considered certain questions concerning a preliminary injunction entered in this case and upheld various challenges to that preliminary injunction. In *Commonwealth* v. *Cotter*, 415 Mass. 183 (1993), and *Commonwealth* v. *Brogan*, 415 Mass. 169 (1993), this court affirmed convictions for the violation of that preliminary injunction, the operative terms of which appear in the *Brogan* opinion. See *id.* at 170 n.1.

"rescue" is to keep women out of an abortion clinic and to prevent abortions from taking place at that clinic. The judge found that on nine dates between August 30, 1989, and January 17, 1991, anti-abortion demonstrators blocked entrances or physically invaded abortion clinics or buildings housing abortion clinics in the Commonwealth. These "rescues" occurred in Hyannis, Boston, Brookline, New Bedford, Worcester, and Springfield, and involved six abortion clinics. In each of these instances, the blocking or invading demonstrators remained on private property after they had been notified that they were trespassing.

It would prolong this opinion unnecessarily to recite all the facts of each incident. As an example, we describe the August 10, 1990, blockade of Preterm Health Services, Inc. (Preterm), a clinic located on Beacon Street in Brookline, in which each of the defendants participated. From 6:40 A.M. until 8:30 A.M. on that day, a group of about twenty people sat with their backs up against the front door of the building that housed the clinic. It was not possible to open that door. Another group sat with their backs against the rear public entrance to the building, preventing the door from being opened. The defendants were advised that they were trespassing. Brookline police officers read the preliminary injunction to the groups at the two doors and demanded that they leave. Shortly after 8:20 A.M., Brookline police began removing the persons blocking access to the building. During the period of the blockade most patients and staff could not enter the building. A few patients entered the building through the garage or the back door during a brief period when that door was not blocked. Those patients who entered after 8:50 A.M. "appeared to be very upset — they were crying and shaking and holding on tightly to others as they walked into the clinic. Their demeanor differed markedly from the usually calm demeanor of patients entering Preterm on days when many picketers but no blockaders were

present outside Preterm." When the police finally cleared the front door of protesters, a crowd of patients entered the building. They appeared upset; they were crying, breathing heavily, and shaking.[5]

Each of the defendants before us participated in the occupation of a portion of the medical area of a clinic. We recite one typical example, in which the defendants Brogan and O'Shea participated on January 17, 1991, at Womancare of New Bedford. The doors to the medical area of the clinic were kept locked. A woman who pretended to be a patient was able by a ruse to have the doors unlocked, and fifteen to twenty people rushed into the medical area of the clinic, dragging a protesting clinic employee along with them where she was pushed up against a wall. One group of invaders sat with their backs to each other in one examining room, locked together with Kryptonite bicycle locks around their necks. Another group of six lay on the floor extending into the entrances of two other examining rooms, locked together by a series of Kryptonite bicycle locks around their necks. Three of these people also wore at their ankles a modified Kryptonite bicycle lock encased in a welded steel pipe in such a way that a locksmith found it impossible to reach the lock until the fire department cut the casing. No scheduled abortions were performed that day. A patient who was in the clinic when the incident started was extremely upset. The police ultimately removed the intruders.

1. The defendants correctly grant the Attorney General has standing to maintain this action (see G.L. c. 12, § 11H [1992

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[5] On August 23, another blockade occurred at Preterm in which all the appellants except Blake participated. On this occasion, two Kryptonite locks were placed on the outside of the rear doors of the building and four such locks were placed on the gates to the private garage in the building. Patients whose procedures were delayed were crying and tense when they reached the clinic. "They were concerned for their privacy and confidentiality."

ed.]), but argue that no other plaintiff has.[6] We need not decide the standing of the other plaintiffs, a question which involves in part the right of a doctor or an abortion clinic to argue the constitutional rights of patients.[7] The trial judge made limited findings on the question whether the clinics sustained harm in their own right from the defendants' conduct. If they did, they could have standing to maintain this action on their own behalves. As we have said, however, the standing of the Attorney General supports the maintenance of this action. We, therefore, turn to the defendants' substantive challenges to the judgment entered against them.

2. The defendants' conduct amounted to threats, intimidation, and coercion within the meaning of those words in G.L. c. 12, § 11H. The defendants grant that they sat in clinics and in clinic doorways and thereby delayed or prevented abortions. This, they argue, cannot establish liability under the MCRA, because their conduct did not interfere with, or attempt to interfere with, anyone's rights "by threats, intimidation or coercion." G.L. c. 12, § 11H.

The defendants first say that their conduct was a direct frustration of the rights of others, and that a "direct violation of a person's rights does not by itself involve threats, intimidation, or coercion." *Longval* v. *Commissioner of Correction*,

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[6] The action should have been dismissed as to Rebecca Roe, a fictitious person. See *Doe* v. *Governor*, 381 Mass. 702, 705 (1980). The plaintiffs conceded the point at trial.

[7] The Supreme Court of the United States divided evenly on this point in *Singleton* v. *Wulff*, 428 U.S. 106, 113-118 (1976). See *id.* at 131 (Powell, J., dissenting). Lower Federal courts have generally held that abortion providers have standing to assert the rights of their patients who are not parties to the action. See, e.g., *New York State Nat'l Org. for Women* v. *Terry*, 886 F.2d 1339, 1347-1348 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Planned Parenthood Ass'n of Cincinnati* v. *Cincinnati*, 822 F.2d 1390, 1394-1396 (6th Cir. 1987).

We need not decide whether the doctor or the clinics have standing under the law of the Commonwealth (see *Slama* v. *Attorney Gen.*, 384 Mass. 620, 624-625 [1981]), or whether this question is irrelevant if they have standing under Federal law.

404 Mass. 325, 333 (1989). See *Nicholas B.* v. *School Comm. of Worcester*, 412 Mass. 20, 24 (1992); *Layne* v. *Superintendent, Mass. Correctional Inst., Cedar Junction*, 406 Mass. 156, 158 (1989); *Pheasant Ridge Assoc. Ltd. Partnership* v. *Burlington*, 399 Mass. 771, 781 (1987). Each of these cases involved direct action against the plaintiff which "by itself" (*Longval, supra*) did not amount to a violation of the MCRA. If, however, direct action also includes threats against, or intimidation or coercion of, a particular individual or individuals, liability under the MCRA can be established, and will be established if such threats, intimidation, or coercion interfered with that individual's exercise or enjoyment of rights secured by law. The judge correctly concluded that this case involved more than simple direct action in denial of the rights of women seeking abortion services.

The defendants next claim that the facts do not show an actual or potential physical confrontation accompanied by a threat of harm, proof of which has been an element of MCRA claims. See *Willitts* v. *Roman Catholic Archbishop of Boston*, 411 Mass. 202, 210 (1991); *Layne* v. *Superintendent, Mass. Correctional Inst., Cedar Junction, supra* at 158; *Bally* v. *Northeastern Univ.*, 403 Mass. 713, 719-720 (1989).[8] In such circumstances a threat, intimidation, or coercion, interfering with secured rights gives rise to a MCRA violation. There is no doubt that the defendants' conduct involved physical confrontations accompanied by threats of harm.

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[8] The Massachusetts Civil Rights Act was enacted in response to deprivations of secured rights by private individuals using violence or threats of violence amounting to racial harassment. Our cases holding that the Massachusetts Civil Rights Act was violated have involved actual or potential physical confrontations involving a threat of harm. *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 95 (1987), for example, involved potential threats to the physical safety of the audience and symphony players. Evidence of an actual or potential physical confrontation between two peole (i.e., clinic staff and the defendants) that has the effect of depriving a third person (i.e., patients) of protected rights can sufficiently prove a violation of the MCRA. See *id.* at 100.

This court has not adopted a comprehensive definition of the words "threats, intimidation or coercion." The trial judge defined the words in terms that we accept. "Threat" in this context involves the intentional exertion of pressure to make another fearful or apprehensive of injury or harm. See *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 104 (1987) (O'Connor, J., dissenting); *Delaney* v. *Chief of Police of Wareham*, 27 Mass. App. Ct. 398, 409 (1989) ("acts or language by which another is placed in fear of injury or damage"). Cf. *Commonwealth* v. *Ditsch*, 19 Mass. App. Ct. 1005 (1985) (reasonable apprehension on the part of the recipient of a criminal threat). "Intimidation" involves putting in fear for the purpose of compelling or deterring conduct. See *Redgrave* v. *Boston Symphony Orchestra, Inc.*, *supra*; *Delaney* v. *Chief of Police of Wareham, supra* ("creation of fear to compel conduct"). In *Deas* v. *Dempsey*, 403 Mass. 468, 471 (1988), we quoted a definition of coercion from Webster's New International Dictionary at 519 (2d ed. 1959): "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done." See *Delaney* v. *Chief of Police of Wareham, supra* ("the active domination of another's will").

In the context of this case, the judge correctly applied the objective standard of whether a reasonable woman seeking abortion services would be threatened, intimidated, or coerced by the defendants' conduct. Cf. *Commonwealth* v. *DeVincent*, 358 Mass. 592, 593 (1971) ("the threat is to be tested objectively; the state of mind of the person threatened is not controlling"); *Commonwealth* v. *Ditsch, supra* (reasonable apprehension of criminal threats). The defendants do not challenge the use of this standard.

Based on these principles, the judge properly concluded that the defendants' conduct constituted threats, intimidation, and coercion. He made ultimate findings and drew reasonable infer-

ences that the defendants knowingly trespassed on clinic property and intentionally used their bodies or Kryptonite bicycle locks, or both, to prevent others physically from entering, leaving, or using medical facilities to obtain abortions to which they were constitutionally and lawfully entitled. Their conduct "presented frightening, threatening and impermeable physical obstacles to patients attempting to enter the clinics, and forced those patients to forego their right to enter the clinics and obtain abortion services." "The patients reasonably perceived the crowding of a large number of bodies in a confined area of a medical facility as posing a risk of personal physical harm." "[T]he acts of trespassing and crowding into clinic waiting rooms, conference rooms, operating rooms and medical areas reasonably threatened and intimidated patients who were there awaiting services." "The defendants' actions were specifically designed to dissuade the patients from seeking the immediate care and treatment to which they were constitutionally entitled." The judge ruled properly that the defendants' conduct "constitutes the application of physical force to constrain the patients and staff of the plaintiff clinics from receiving and providing abortion services. Such conduct is coercive within the meaning of MCRA. The Court further finds that such conduct constitutes 'an actual or potential physical confrontation accompanied by the threat of harm.' "

"These actions were threatening, intimidating and coercive to patients who sought to enter and use the clinics' facilities. The defendants' physical confrontation of clinic patients and staff on numerous occasions in cities and towns across the Commonwealth, even where no violence was involved, was designed, intended and highly likely to instill fear and concern for personal safety in a reasonable person seeking abortion services."[9] In these circumstances, the judge was warranted in

[9] By contrast, the Court finds and concludes that lecturing, counselling, picketing, signing and praying at or near the clinics by certain defendants and their supporters,

finding, and was correct in ruling, that a reasonable woman seeking abortion services would be made fearful and apprehensive, and would feel pressured, by the defendants' conduct so that she would desist from seeking those services while that conduct continued.

3. The defendants claim error in the rejection of their various attempts to identify and then depose the patients with whose rights they had admittedly interfered. The defendants assert that they were entitled to have a chance to rebut the plaintiffs' case by offering testimony from patients whose scheduled procedures at blockaded clinics were delayed or postponed. The defendants' purpose was to show that the delays were not the result of threats, intimidation, or coercion perceived by the patients, but rather were the result of the reality that the clinics were effectively closed by the blockades.

As we have already noted, the standard is whether a reasonable woman would have felt threatened, intimidated, or coerced by the defendants' conduct. Therefore, unlike a criminal case in which proof of a victim's state of mind may be indispensable in making the prosecution's case (see, e.g., *Commonwealth* v. *Chalifoux*, 362 Mass. 811, 816 [1973]), testimony concerning the states of mind of specific women who were unable to obtain abortions as planned was not essential to the plaintiffs' proof. We are not concerned here with the rights of a criminal defendant, but only with a civil action for an injunction with no claim by specific women for the award of damages. Because the Commonwealth undertook to prove its case through nonpatient witnesses who were present at the protests, no patient

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where the patients' access to the clinics was not obstructed or precluded, did not constitute threats, intimidation or coercion of the clinics' patients. So long as the defendants remain on public property and do not create physical barriers or promote physical confrontation or physical contact, then their activities cannot reasonably be perceived as threatening, intimidating or coercive in violation of MCRA."

whose rights were allegedly interfered with testified. The denial before and during trial of attempts to identify such persons, therefore, did not impede the defendants' cross-examination of the plaintiffs' witnesses. On the other hand, any evidence that women who were unable to obtain abortions as scheduled did not feel threatened, intimidated, or coerced by the defendants' conduct would be relevant to the issue of the reaction of a reasonable woman in the circumstances. How actual participants responded to events could be a guide to how a reasonable person would react in the same circumstances.[10] Cf. *Commonwealth* v. *Matchett*, 386 Mass. 492, 500-501 (1982).

Although the defendants' relevancy contention is theoretically sound, in the circumstances of this case it lacks practical plausibility. The number of trespasses, the scores of scheduled abortions that were impeded, the physical intrusiveness of the blockaders, and the evidence of the reactions of patients and clinic personnel make it unlikely that the defendants would have discovered evidence from these women, whose lives they disrupted, that would have led the trial judge to factual conclusions other than those he reached. In other words, if there had been error on this issue, it would have created no reasonable risk that nondisclosure prejudiced the defendants. Cf. *Com-*

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[10] Moreover, as a matter of discovery, the range of permissible inquiry is broad. See Mass. R. Civ. P. 26(b), 365 Mass. 772 (1974); *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947), construing a cognate rule of Federal procedure.

None of the appellants, however, sought by pretrial discovery to learn the identities of the women who were affected by their conduct. They rely on a discovery request and an attempt to obtain a court order enforcing discovery from certain clinics filed by another defendant. No enforcement order was sought against the Attorney General who probably did not have any knowledge of which patients were affected by the defendants' conduct.

The defendants were thwarted in obtaining the same information by subpoena at trial. Among the facts agreed to by the Attorney General, the other plaintiffs, and the defendants in a joint pretrial memorandum was that: "Defendants in discovery have sought the identities of women who were scheduled to receive services at the clinics on the days in question and plaintiffs have declined to produce them." We shall assume in the defendants' favor that all aspects of their argument concerning the denial of information sought is before us.

monwealth v. *Bishop*, 416 Mass. 169, 181 (1993), citing *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 57 (1987) ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome").

It was, in any event, within the judge's discretion whether to grant or deny the defendants' attempts to learn, by pretrial order and subpoena, the identities of the numerous women with whose rights they had interfered. Because no such woman testified at trial, the plaintiffs assumed the task of proving threats, intimidation, and coercion without testimony from the women concerning their states of mind.

The intrusion into the privacy rights of these women would have been substantial. The allowance of disclosure in cases such as this could have a discouraging impact on the bringing of actions to enforce rights under the MCRA and on a woman's exercise of her constitutional right to an abortion. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 112 S.Ct. 2791, 2829-2830 (1992) (disclosure through spousal notification invalid as an undue burden that "will operate as a substantial obstacle to a woman's choice to undergo an abortion"); *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986) ("A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly"), overruled on other grounds by *Planned Parenthood* v. *Casey*, *supra* at 2823; *Commonwealth* v. *Collett*, 387 Mass. 424, 428 (1982) ("If it becomes known that confidences are violated, other people may be reluctant"). Considering the likelihood that the defendants would obtain no evidence materially beneficial to them from women whose lives they intentionally and admittedly disrupted and further

considering that disclosure of the identity of these women would intrude into their privacy on a matter of constitutional right,[11] we conclude that the trial court did not abuse its discretion in denying disclosure of the identities of the women affected by the defendants' conduct.[12]

We add an observation, not essential to our conclusion on this issue, but supportive of it. The Attorney General, as a plaintiff in this action, represents the public interest in guarding against future violations of the MCRA. The Legislature has given him special standing to pursue injunctive relief in cases such as this. G.L. c. 12, § 11H. This action is brought solely to protect against future unlawful conduct that would be harmful to persons not currently identifiable. In such a case, the fact that the defendants' unlawful conduct if repeated would cause a reasonable woman in the circumstances to feel threatened, intimidated, or coerced requires prospective relief in the public interest.[13]

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[11] The constitutional right of privacy concerns a person's interest both in avoiding disclosure of personal matters and in independence in making certain kinds of important decisions. See *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977). Rejecting a claim that a New York law threatened these interests because it required the confidential filing and computer storage of information concerning the use of certain prescription drugs, the Court labeled as remote the possibility that judges would fail to protect attempts at unwarranted disclosures for evidentiary purposes. *Id.* at 601-602. The trial judge fulfilled the Supreme Court's expectations.

[12] For the same reasons, rejection of defendants' discovery attempts did not deny them due process of law.

We need not reach the question whether affected women who bring an action have a constitutional right to have their identities (and the fact that they had been pregnant and decided to obtain an abortion) kept in confidence in an injunction case like this. If this were an action seeking relief for harm done to an individual plaintiff or to a class of plaintiffs, the defendants' entitlement to information about those individuals would be quite different from their entitlement here. See *Western Elec. Co.* v. *Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976); *National Org. for Women* v. *Sperry Rand Corp.*, 88 F.R.D. 272, 274-275 (D. Conn. 1980).

[13] The fact that the Attorney General was given standing to represent the public interest in bringing a suit shows a desire to encourage compliance with the law in situations where individual plaintiffs are unlikely to come forward because of a perceived stigma associated with the activity of seeking abortion services, because the duration of their involvement with the issue is transient, or because they cannot

4. The defendants claim that a portion of the amended permanent injunction is constitutionally impermissible.[14] Their argument is directed to clause (c) of the injunction which was not included in the preliminary injunction that this court considered in *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue*, 406 Mass. 701 (1990).[15] Clause (c) enjoins the defendants, individually and collectively, from "directing, instructing, conspiring with and/or [*sic*] aiding or abetting directly or indirectly any person, persons, groups or organizations who engage in any of the acts described in paragraphs (a) and (b) above."[16]

The defendants focus their argument on the words "aiding or abetting directly or indirectly any person . . . [or] groups . . . who engage in any of the acts described." They claim that the injunction improperly refers to "aiding *or* abetting" (emphasis added) rather than conjunctively to both; that the prohibition of "indirect" aiding or abetting is a "very vague notion"; that the reference to aiding or abetting "groups" invites guilt by association; and that the prohibition against aiding or

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anticipate that this is an issue that will affect them in the future. Respecting the judge's decision to proceed without attempting to compel an appearance by patients as witnesses and allowing the injunction to stand is consistent with the outline of the MCRA and the Attorney General's role under it.

[14] We consider this point even though the defendants did not raise it in the trial court. The defendants do not dispute the plaintiffs' assertion that the defendants had opportunities to raise this challenge and did not do so.

[15] In the earlier case, the defendants argued unsuccessfully that the preliminary injunction violated their First Amendment rights because it (a) was impermissibly vague, (b) was overbroad because it prohibits constitutionally protected conduct, and (c) imposed an improper prior restraint on the defendants' right of free expression. *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue*, *supra* at 714-717.

[16] Clause (a) permanently enjoined trespassing, blocking, or obstructing access to or from any facility in the Commonwealth which provides abortion counseling or services. Clause (b) permanently enjoined physical restraining or obstructing or committing acts of force or violence against persons entering, leaving, or working at or seeking services from any such facility.

abetting blockading,[17] rather than against criminal activity itself, is vague.[18]

The complete answer to the defendants' claims is that clause (c), using the words "aiding or abetting," is modeled on traditional concepts of accessory liability which limit the scope of the injunction and identify those acts that are prohibited. See *Kyte* v. *Philip Morris Inc.*, 408 Mass. 162, 168-169 (1990) (aiding and abetting require proof that the defendant knew of its substantial, supporting role in an unlawful enterprise). *Commonwealth* v. *Sylvester*, 400 Mass. 334, 339 & n.6 (1987) (acquiescence and presence alone not enough). Any violator of the prohibition against aiding or abetting in clause (c) must share the mental state of the principal violator. See *Commonwealth* v. *Richards*, 363 Mass. 299, 307-308 (1973). Cf. *Commonwealth* v. *Adams*, 416 Mass. 558, 565 (1993). Because intentional conduct is the measure of a violation of the MCRA (see *Deas* v. *Dempsey*, 403 Mass. 468, 471 [1988]; *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 99 [1987]) and of clauses (a) and (b) of the injunction, proof of a violation of the "aiding or abetting" prohibition of clause (c) will require a showing of a defendant's intention to assist intentional conduct violative of clause (a) or clause (b), or both.

5. With the exception that the judgment should be vacated as to Rebecca Roe and the action dismissed as to her (see note 6 above), the amended permanent injunction, entered on October 28, 1991, is affirmed as applied to the defendants.

So ordered.

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[17] The injunction does not use the word "blockading."

[18] The defendants cite for support two loyalty oath cases, in which the phrase "aid or abet" does not appear. See *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Cramp* v. *Board of Pub. Instruction of Orange County*, 368 U.S. 278 (1961). They also rely on *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), briefly suggesting that clause (c) presents a First Amendment overbreadth problem. It is in this latter respect alone that the defendants may assert the rights of others who might be affected by the injunction. See *Commonwealth* v. *Bohmer*, 374 Mass. 368, 371 n.6 (1978).

O'CONNOR, J. (dissenting, with whom NOLAN and LYNCH, JJ., join). The defendant organizations and individuals and "their officers, agents, servants, employees and those persons in active concert or participation with them who receive actual notice of this Order, either orally or by receipt of a copy thereof, are permanently enjoined, individually and collectively, from:

> "a. trespassing on, blocking or in any way obstructing access (either ingress or egress) to any facility in the Commonwealth which provides abortion counselling or services; or
>
> "b. physically restraining or obstructing or committing any acts of force or violence against persons entering, leaving, working at or seeking to obtain services from any facility in the Commonwealth which provides abortion counselling or services; or
>
> "c. directing, instructing, conspiring with and/or aiding or abetting directly or indirectly any person, persons, groups or organizations who engage in any of the acts described in paragraphs (a) and (b) above."

In my view, clauses (a) and (c) are constitutionally overbroad and should be vacated. In my dissent in *Planned Parenthood League of Massachusetts, Inc.* v. *Operation Rescue*, 406 Mass. 701 (1990) (*Planned Parenthood I*), I presented my argument that clause (a) of the preliminary injunction at issue in that case was overbroad. My view has not changed. Therefore, because clause (a) of the permanent injunction at issue in this case is substantially the same as clause (a) of the preliminary injunction at issue in *Planned Parenthood I*, I dissent in the present case.

No worthwhile purpose would be served by a full repetition here of the views expressed in the earlier dissent. Essentially, my position was and is that an injunction against the defendants and others "in active concert or participation with them" from "trespassing on, blocking, or in *any way obstructing* access" (emphasis added) to abortion facilities, is overbroad because "reasonable persons, wishing to express their views about the morality of abortion and whether abortion should be legal, [cannot] be confident that they would not violate that injunction by joining others on public ways adjacent to a clinic to picket, pray, chant, and exhort others to accept their viewpoint. The injunction expressly forbids not only trespassing and blocking, but also 'obstructing' ingress or egress in any way. It cannot reasonably be said that the prohibition against obstruction [in any way] adds nothing to the prohibition against trespassing and blocking[, both of which terms connote physical interference]. Such a result can be reached only by reading words out of the injunction. The injunction must fairly be construed as prohibiting the hindrance of access to clinics by nonphysical confrontation on public ways as well as the physical block[ing] of entranceways." *Planned Parenthood I, supra* at 721-722 (O'Connor, J., dissenting). Therefore, clause (a) and clause (c), which incorporates clause (a), impermissibly chill, even if they are not intended to prohibit, conduct protected by the First Amendment to the United States Constitution.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 89-2487-F

PLANNED PARENTHOOD LEAGUE
OF MASSACHUSETTS, INC., ET AL.,
Plaintiffs,
BARRY ADLER, D/B/A GYNECARE,
Plaintiff-Intervenor,
and
COMMONWEALTH OF MASSACHUSETTS
BY ITS ATTORNEY GENERAL,
Plaintiff-Intervenor,

v.

OPERATION RESCUE, ET AL.,
Defendants.

AMENDED JUDGMENT

This action came on before the Court, Peter M. Lauriat, J., presiding, and the issues having been duly heard, and findings of fact and rulings of law having been duly rendered, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that:

1. The defendants' motions for a directed finding in their favor, filed at the conclusion of the plaintiffs' case-in-chief and renewed at the conclusion of the defendants' case, are each **DENIED**;

2. Judgment shall enter in favor of plaintiffs Planned Parenthood of Massachusetts, Inc., Preterm, Inc., Repro Associates, Inc., Crittenton Hastings House, Stanton P. Goldstein, M.D., Rebecca Roe, plaintiff-intervenor Barry Adler, d/b/a Gynecare, and plaintiff-intervenor Commonwealth of Massachusetts against the defendants Operation Rescue: Boston, Pro Life Action Network of Arlington, Barbara Bell, Timothy Biggins, Kevin Blake, Timothy Brigham, Sean Brogan, Rachel Cann, Shirley Clifton, Sean Corrigan, William Cotter, Claire Croghan, Robert Delery, Denise Duda, James Dudley, Robert Filos, Darroline Firlit, Francis Haggerty, Bruce Hendon, Lawrence Howe, Mary Kelliher, Michelle LaPlume, Joseph Manning, Peter Marleau, Jean Marshall, John D. McCarthy, Jr., Richard McCarthy, Anne McNamara, Bruce Murch, Adeline Murray, James Myette, Mortimer O'Shea, Andrew Olsson, Brian Phaneuf, Fred Pulsifer, Philip St. Jean, Russell Saulnier, Andrew Singer, Jr., Robert Souza and Catherine Wommack on the plaintiffs' Joint Amended Complaint for violations of the Massachusetts Civil Rights Act, General Laws c. 12, §§ 11H-J;

3. The defendants Operation Rescue: Boston, Pro Life Action Network of Arlington, Barbara Bell, Timothy Biggins, Kevin Blake, Timothy Brigham, Sean Brogan, Rachel Cann, Shirley Clifton, Sean Corrigan, William Cotter, Claire Croghan, Robert Delery, Denise Duda, James Dudley, Robert Filos, Darroline Firlit, Francis Haggerty, Bruce Hendon, Lawrence Howe, Mary Kelliher, Michelle LaPlume, Joseph Manning, Peter Marleau, Jean Marshall, John D. McCarthy, Jr., Richard McCarthy, Anne McNamara, Bruce Murch, Adeline Murray, James Myette, Mortimer O'Shea, Andrew Olsson, Brian Phaneuf, Fred Pulsifer, Philip St. Jean, Russell Saulnier, Andrew Singer, Jr., Robert Souza and Catherine Wommack, their officers, agents, servants, employees and those persons in

active concert or participation with them who receive actual notice of this paragraph of this Order, either orally or by receipt of a copy thereof, are permanently enjoined, individually and collectively, from:

a. trespassing on, blocking or in any way obstructing access (either ingress or egress) to any facility in the Commonwealth which provides abortion counselling or services; or

b. physically restraining or obstructing or committing any acts of force or violence against persons entering, leaving, working at or seeking to obtain services from any facility in the Commonwealth which provides abortion counselling or services; or

c. directing, instructing, conspiring with and/or aiding or abetting directly or indirectly any person, persons, groups or organizations who engage in any of the acts described in paragraphs (a) and (b) above.

Pursuant to General Laws, c. 12, §§ 11H and 11J, **VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE;**

4. The defendants Robert Delery and Barbara Bell, their agents, servants, employees and those persons in active concert or participation with them who receive actual notice of this Order, are permanently enjoined from:

a. representing to anyone, orally or in writing, that he or she is acting as an escort for, or is in any way affiliated with the Planned Parenthood Clinic of Greater Boston, located at 1031 Beacon Street, Brookline, Massachusetts; and

b. wearing an apron, pinney or other identification signifying that he or she is an escort for, or is in any way affiliated with the Planned Parenthood Clinic of Greater Boston, located at 1031 Beacon Street, Brookline, Massachusetts.

5. The plaintiffs' Joint Amended Complaint against defendant George Duda is **DISMISSED**.

6. The claims of the plaintiffs League of Women Voters of Massachusetts, Inc., Massachusetts National Organization for Women, Mass. Choice and Religious Coalition for Abortion Rights are **DISMISSED**; and

7. The plaintiffs' claims against the defendants Constance Smith, Patricia Anthony, Paul Baldassari, Joseph Beard, Gregory Benoit, Kenneth Berthiaume, Peter F. Biggins, Fran Carl, William Clark, Paul Colbath, Anthony Doherty, Leslie Ducott, Timothy Enos, Kenneth Evans, Harriet Fremont-Smith, Warren Goddard, Timothy Hicks, William Kenney, Eric Knowles, Sharon Lach, Albert Lanzo, Patricia Leonard, Edward Long, Sandra Logue, Frank Macey, Russell Marinich, Mario Martin, James McClymonds, Judith Morse, Philip O'Connell, Adeline Parisi, Frances Pizzelli, Jean Proia, Donald Putnam, Richard Regan, Scott Richardson, John Riordan, Mark Smith, Irma Sparling, Michael Trainor, and Kevin Turenne are **DISMISSED WITHOUT PREJUDICE**.

/s/

Peter M. Lauriat
Justice of the Superior Court

DATED: October 28, 1991.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 89-2487-F

PLANNED PARENTHOOD LEAGUE
OF MASSACHUSETTS, INC., ET AL.,
Plaintiffs,
BARRY ADLER, D/B/A GYNECARE,
Plaintiff-Intervenor,
and
COMMONWEALTH OF MASSACHUSETTS
BY ITS ATTORNEY GENERAL,
Plaintiff-Intervenor,

v.

OPERATION RESCUE, ET AL.,
Defendants.

AMENDED PERMANENT JUDGMENT

The defendants Operation Rescue: Boston, Pro Life Action Network of Arlington, Barbara Bell, Timothy Biggins, Kevin Blake, Timothy Brigham, Sean Brogan, Rachel Cann, Shirley Clifton, Sean Corrigan, William Cotter, Claire Croghan, Robert Delery, Denise Duda, James Dudley, Robert Filos, Darroline Firlit, Francis Haggerty, Bruce Hendon, Lawrence Howe, Mary Kelliher, Michelle LaPlume, Joseph Manning, Peter Marleau, Jean Marshall, John D. McCarthy, Jr., Richard McCarthy, Anne McNamara, Bruce Murch, Adeline Murray, James Myette, Mortimer O'Shea, Andrew Olsson, Brian

Phaneuf, Fred Pulsifer, Philip St. Jean, Russell Saulnier, Andrew Singer, Jr., Robert Souza and Catherine Wommack, their officers, agents, servants, employees and those persons in active concert or participation with them who receive actual notice of this Order, either orally or by receipt of a copy thereof, are permanently enjoined, individually and collectively, from:

a. trespassing on, blocking or in any way obstructing access (either ingress or egress) to any facility in the Commonwealth which provides abortion counselling or services; or

b. physically restraining or obstructing or committing any acts of force or violence against persons entering, leaving, working at or seeking to obtain services from any facility in the Commonwealth which provides abortion counselling or services; or

c. directing, instructing, conspiring with and/or aiding or abetting directly or indirectly any person, persons, groups or organizations who engage in any of the acts described in paragraphs (a) and (b) above.

Pursuant to General Laws c. 12, §§ 11H and 11J, **VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.**

/s/

Peter M. Lauriat
Justice of the Superior Court

Dated: October 28, 1991.

Supreme Court, U.S.
FILED
AUG 5 1994
OFFICE OF THE CLERK

(2)

No. 94-52

In the Supreme Court of the United States

OCTOBER TERM, 1994

KEVIN BLAKE, SEAN BROGAN, MARY KELLIHER, JOHN D. McCARTHY AND MORTIMER O'SHEA,
PETITIONERS,

v.

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC., ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the federal due process clause require that persons who blockade abortion clinics and are enjoined by state courts from doing so in the future be given the names and addresses of the clinics' abortion patients, and be allowed to depose them and call them to testify at trial?

2. Does a permanent injunction, which bars Petitioners from "trespassing on, blocking or in any way obstructing access" to abortion facilities, violate the First Amendment?

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In the
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PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC., ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Respondents[1] respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts, Appendix A to the petition.

[1] Respondents submitting this brief consist of four clinics that provide abortions and that were blockaded, and the physician on duty at one of them: Planned Parenthood League of Massachusetts, Inc.; Preterm, Inc.; Repro Associates (whose corporate name is Associated Physicians, Inc.); Crittenton Hastings House (a corporation whose full name is Crittenton Hastings House of the Florence Crittenton League); and Stanton P. Goldstein, M.D. None of the four corporate respondents has a parent or subsidiary.

OPINIONS BELOW

In addition to the reported opinion of the Supreme Judicial Court, *Planned Parenthood League of Massachusetts, Inc.* v. *Blake*, 631 N.E.2d 985 (Mass. 1994), the trial court issued a 150 page unreported decision setting forth in detail the conduct by Petitioners and others which led to issuance of the permanent injunction. *See* Appendix to [Petitioners'] Brief in the Supreme Judicial Court, Volume II, pp. 397-546 (hereinafter A., Vol., p. ____).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions alleged by Petitioners to be involved (the due process clause of the Fourteenth Amendment and the speech clause of the First Amendment) are set forth in the petition. The case was substantially decided by the Supreme Judicial Court on the basis of state law, the Massachusetts Civil Rights Act ("MCRA"), Mass. Gen. Laws, chap. 12, §§11H-11I, which, in pertinent part, provides as follows:

> Section 11H. Whenever any person or persons . . ., interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. . . .
>
> Section 11I. Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or at-

> tempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section. . . .

STATEMENT OF THE CASE

Having conducted blockades and clinic invasions that made it physically impossible for women to exercise their constitutional right to choose abortion confidentially, Petitioners argue under a fair trial/due process theory that they were improperly enjoined under state law from doing it again because the state court would not allow them to find out who the women were, depose them, and then call them as *defense* witnesses at trial (to say what? that the women felt positive about clinic entrances being blockaded and operating rooms occupied?). This cynical tactic did not succeed in the Massachusetts Supreme Judicial Court and cannot succeed here.

The Supreme Judicial Court ("SJC") held that the Massachusetts Attorney General had standing to sue under the applicable state statute — the MCRA. The SJC therefore declined to reach the issue of the standing of the abortion clinics and physician to argue the constitutional privacy rights of their patients (which the trial court had upheld), but noted that lower federal courts have generally recognized such standing. Petition, A6-7 and n.7.

The SJC then held that the trial court had correctly interpreted the meaning of the statutory requirements of the MCRA — "threats, intimidation or coercion", and had correctly applied the objective standard of whether a "reasonable woman seeking abortion services" would be threatened, intimidated or coerced by Petitioners' conduct. Petition A7-9.

Next, the Court held that the trial court properly concluded that Petitioners conduct violated this statute, noting the trial court's findings that:

> . . . the defendants knowingly trespassed on clinic property and intentionally used their bodies or Kryptonite bicycle locks, or both, to prevent others physically from entering, exiting or using medical facilities to obtain abortions. . . . Their conduct "presented frightening, threatening and impermeable physical obstacles to patients attempting to enter into clinics, and forced those patients to forego their right to enter the clinics and obtain abortion services." "The patients reasonably perceived the crowding of a large number of bodies in a confined area of a medical facility as posing a risk of personal physical harm." "[T]he acts of trespassing and crowding into clinic waiting rooms, conference rooms, operating rooms and medical areas reasonably threatened and intimidated patients who were there awaiting services." "The defendants actions were specifically designed to dissuade the patients from seeking the immediate care and treatment to which they were constitutionally entitled." The [trial] judge ruled properly that the [Petitioners'] conduct "constitutes the application of physical force to constrain the patients and staff of the plaintiff's clinics from receiving and providing abortion services. Such conduct is coercive within the meaning of [the] MCRA [and] . . . constitutes 'an actual or potential physical confrontation accompanied by the threat of harm.'"
>
> "These actions were threatening, intimidating and coercive to patients who sought to enter and use the clinics' facilities. The defendants' physical confrontation of clinic patients and staff on numerous occasions in cities and towns across the Commonwealth, even where no violence was involved, was designed, intended and highly likely to instill fear and concern for personal safety in a reasonable person seeking abortion services." [Petition, A10]

Accordingly, the SJC upheld as correct the trial court's ruling that "a reasonable woman seeking abortion services" would

be made "fearful and apprehensive, and would feel pressured," by Petitioners' conduct, so that "she would desist from seeking those services while that conduct continued." *Id.*, A11.

The SJC rejected Petitioners' claim of error in being denied the identities of actual women patients, noting that (i) in this civil case under state law the applicable test was the reaction of a hypothetical reasonable woman not a specific "victim", (ii) only prospective injunctive relief was sought, (iii) plaintiffs had proved their case with non-patient witnesses (and other evidence), (iv) Petitioners' contention lacked "practical plausibility" because there was no "reasonable risk" that Petitioners could have discovered evidence from "women . . . whose lives they disrupted" that would have led the trial judge to different conclusions in light of the evidence at trial ("number of trespasses", "scores of scheduled abortions that were impeded", "physical intrusiveness of the blockades"), (v) it was within the trial court's discretion to deny the requested discovery, particularly given that no woman patient testified and that the plaintiffs "assumed the task of proving" their case without such testimony, and (vi) the intrusion into women's privacy rights would have been substantial. *Id.*, A12-13.

> Considering the likelihood that the defendants would obtain no evidence materially beneficial to them from *women those lives they intentionally and admittedly disrupted* and further considering that disclosure of the identity of these women would intrude into their privacy on a matter of constitutional right, we conclude that the trial court did not abuse its discretion in denying disclosure of the identities of the women affected by [Petitioners'] conduct. *Id.*, A13-14, emphasis added.

The SJC also noted that the Massachusetts Attorney General (who would himself have no access to clinic patients' names) is given special statutory standing to sue under the MCRA, and that the case at bar was brought solely to protect

"against future unlawful conduct that would be harmful to persons not currently identifiable." *Id.*, A14. This statutory standing permits the Attorney General to encourage compliance with the law where "individual plaintiffs are unlikely to come forward because of a perceived stigma associated with the activity of seeking abortion services, because the duration of their involvement with the issue is transient, or because they cannot anticipate that this is an issue that will affect them in the future." *Id.*, A14, n.13.[2]

No justice of the SJC dissented from the holding that the trial court did not abuse its discretion in denying disclosure of the identities of woman patients.

Finally, the SJC rejected Petitioners' argument to it against clause (c) of the injunction, holding that there was no error in the use of the words "aiding or abetting". *Id.*, A13-14. Three justices dissented, largely addressing their dissent to the separate holding in *Planned Parenthood League of Mass.* v. *Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990) (upholding the preliminary injunction in this case) that clause (a) of the injunction was overbroad because it could be applied to non-physical confrontations.

REASONS FOR DENYING THE WRIT

No important issue of federal law is presented by the SJC decision. Massachusetts law permits enjoining persons from interfering with civil rights by threats, intimidation *or* coercion, authorizes the Massachusetts Attorney General to seek such an injunction, and measures whether such interference has occurred by an objective standard of a hypothetical reasonable person (here, a woman seeking abortion). Respondents overwhelmingly proved such interference. Indeed, Petitioners' effectively admit this, as "coercion" is an independent basis for finding such interference, and they do not challenge

[2] These are the reasons customarily given for abortion clinic and physician standing. *Id.*, A7, n. 7 and cases cited.

the state court ruling that the blockades are inherently coercive.[3] Because Respondents proved their case without calling women abortion patients, because there is no reasonable risk whatever that Petitioners would "have discovered evidence from these women *whose lives they [objectively] disrupted*" to counter that proof (Petition, A12, emphasis added), and because the trial court had discretion to order or deny disclosure, no important issue of federal law is presented by a state court decision holding that there was no abuse of discretion in denying disclosure.[4] Indeed, the SJC avoided creating an important issue of federal law by recognizing that the intrusion into the privacy rights of the woman at issue would have been substantial had disclosure been ordered, by recognizing the constitutional element of that privacy right, and by deciding the case on the basis of interpreting state law (the MCRA) and applying an abuse of discretion standard.

I. Because Petitioners Were Not Entitled To Depose Or Subpoena The Clinics' Women Patients For Abortion Services, Their Claim Of A Fair Trial/Due Process Violation Is Meritless

Petitioners were not entitled to confront in deposition or at trial the women patients whom they previously confronted by blockade and invasion, and their trial was neither unfair nor a violation of due process.

---

[3] The " 'application of physical force to constrain patients and staff of the plaintiff clinics from receiving and providing abortion services . . . is coercive within the meaning of the MCRA.' " Petition, A10.

[4] Contrary to Petitioners' claim (*Id.*, 11), the SJC did *not* call "theoretically sound" Petitioners' claim that woman patients "possessed critical information." Rather, the SJC merely made the obvious evidentiary point that Petitioners' "relevancy contention" was theoretically sound. *Id.*, A12. Due process does not require that every bit of conceivably relevant evidence be discovered or admitted, still less that a party be able to seek it or offer it without regard to the burdens imposed.

A. *Petitioners' Fair Trial/Due Process Argument Ignores The Standing Under State Law Of The Respondents, Especially The Attorney General, To Bring This State Statutory Action*

The Massachusetts Attorney General indisputably has standing, and the Respondent abortion clinics/physician also have standing (though this issue was not reached below), to sue for a violation of the rights of "any person", as those words are used in the MCRA. Whether the particular persons whose rights were interfered with must in fairness be identified as potential witnesses turns on the specifics of the particular case: in this case, they clearly should not have been identified.

Section 11H of the MCRA, which gives the Attorney General standing, allows him to bring an action when the rights of "any person" are interfered with by threats, intimidation or coercion. The statute does not require that the "any person" be identified in all cases.

In addition, Section 11I of the MCRA allows the "any person" himself or herself to bring an MCRA claim. However, abortion clinics have standing to sue on behalf of such persons to protect their privacy. *Singleton* v. *Wulff*, 428 U.S. 106, 117 (1976) (woman "may be chilled from [exercising right to choose abortion] by a desire to protect the very privacy of her decision from the publicity of a court suit"); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 62 (1976); *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973); *Bellotti* v. *Baird*, 443 U.S. 622, 627 n.5 (1979). For the same privacy reasons that allow third party standing, neither "fairness" nor "due process" requires that those patients be identified if an MCRA violation can be proved without their involvement, and if nothing they could say (within the realm of plausibility) would constitute a defense. There were undoubtedly some women patients, for example, who were "deterred" from coming to blockaded clinics because they received a telephone call saying "don't come. We've been blockaded". Because the MCRA is nonetheless violated by the blockade, the identity

of those women is irrelevant to plaintiffs' proof, and irrelevant to any legal defense.

B. *Respondents Proved Violations Of The MCRA By Evidence As To Petitioners' Own Conduct.*

It is *Petitioners' conduct* in physically blocking access to and invading and physically occupying abortion clinics that violates the MCRA.[5] This conduct by itself proved that Petitioners: (a) interfered with women's exercise of their constitutional right to obtain abortions; and (b) did so by threats, intimidation or coercion.

1. Testimony of women patients was not needed to prove threats, intimidation or coercion.

Petitioners incorrectly argue that they should be "allowed to confront the women who were allegedly seeking abortion services to inquire . . . whether she was 'threatened', 'intimidated', or 'coerced' by [Petitioners' actions]." Petition, 16-17. These are, of course, the same women whom Petitioners previously "confronted" by blockading the exteriors and interiors of the clinics where their abortions were scheduled. However, the "crucial evidence" (Petition, 17) is not what some patient "felt", but whether Petitioners blockaded, whether the blockades delayed or prevented abortions, and whether the blockades were threatening, intimidating *or* coercive to a hypothetical reasonable woman seeking an abortion.

A trial court is certainly competent to make a determination — without the testimony of any individual women whose rights have been interfered with — as to whether a reasonable woman seeking an abortion or a reasonable person seeking to provide abortion services would be threatened, intimidated

[5] Respondents proved nine separate occasions involving six abortion clininc where demonstarations "blocked entrances or physically invaded abortion clinics . . . [and] remained . . . after they had been notified that they were trespassing." Petition, A5.

or coerced by defendants' conduct. Here, the SJC held that the trial judge was "warranted in [so] finding, and was correct in [so] ruling. . . ." Petition, A10-11. That holding raises no federal question whatever.

2. Testimony of women patients could not provide a defense.

Similarly, the state court was correct in concluding that provision of patient names to Petitioners would not furnish them with a plausible defense such that patient's privacy rights should be overridden (and, as a practical matter, the case dropped and the MCRA abandoned as a tool to prevent clinic blockades). A blockade "causing abortion services to be prevented or delayed" (Petition, 6) is *per se* "coercion" under the MCRA. And it would have been clearly erroneous for the trial judge *not* to have found that a reasonable woman seeking an abortion would have been threatened or intimidated by the blockade (especially by blockaders "Kryptonited" to each other on the floor of an operating room).

Petitioners suggest the following inquiries that due process somehow requires clinic blockaders to be able to ask patients at deposition or trial before future blockades can be enjoined: "whether a scheduled abortion was delayed because of the woman's reluctance to encounter marching protestors, reluctance to be recognized, reluctance to have people show them pictures or literature, reluctance to go near . . . a crowd . . ., a [moral] change of mind, information from clinic personnel or police that abortions were impossible that day . . . or [which defendants wrongly say is an exclusive alternative] were 'threatened,' 'intimidated', or 'coerced' by the defendants' actions." (Petition, 16-17.)

These inquiries, as a matter of state law (the MCRA), are not relevant because Petitioners do not dispute that they did blockade and invade clinics, preventing abortions. At minimum, that conduct is "coercion" under the MCRA, and properly enjoinable for the future under the MCRA. It is no

defense under the MCRA that some women may have stayed away merely because a blockade draws a crowd, and the press. Undoubtedly, there were patients with scheduled appointments who turned away from a blockaded clinic without ever getting close enough to be threatened or intimidated, and some may have even been telephoned by clinic staff and told that the clinic was blockaded shut and to stand by for a further call to reschedule. These women were all nonetheless coerced: the blockade physically prevented them from gaining access to the clinic. Such coercion — as a matter of *state* law — raises no federal question.

In addition, the state court found that a reasonable woman patient would be threatened or intimidated by the prospect of trying to force her way through the blockade (never mind getting on an operating table in a room of "Kryptonited" blockaders). Petition, A10. Even if "coercion" were not in the MCRA, Petitioners would have no defense unless it can be imagined that a majority or sufficiently large minority of women patients would actually have testified at trial that they did not find the blockade threatening or intimidating so that a judge could not find that a reasonable woman patient would be threatened or intimidated. The likelihood of this is nil — certainly far too low to imagine overriding the constitutional privacy right of women to seek abortion *confidentially*.[6] What reasonable woman seeking an abortion, for example, would

[6] Petitioners', whose blockades at times involved hundreds of supporters either blockading, or demonstrating in support of the blockades, failed to put on a single witness to testify that a blockade was *not* threatening or intimidating. They deposed none of Respondents' (plaintiffs) eyewitnesses. They did not seek redacted records of clinic patient symptoms on the days of the blockades. And they made no showing at trial that abortion patients would say anything to assist in their defense. The most they could suggest is the truism that some patients never got to the point of feeling threatened or intimidated (because of their own personalities, or because they never got close to the clinic), which did not in the least prevent the trial judge on overwhelming evidence from finding that a *reasonable* woman would have felt threatened or intimidated. This truism is, of course, irrelevant to the independently sufficient state law ground for the injunction of "coercion" under the MCRA.

have been willing at the blockade in New Bedford (Petition, A6) to climb over and among the "Kryptonited" blockaders in the hallway (whose legs protruded into the operating rooms), disrobe in their presence, lie down on an examining table, undergo an abortion procedure *in their presence*, remain for a one hour recovery period, and then walk out again through the same group of invaders — all without feeling threatened or intimidated?[7]

Because no individual woman was a party to this lawsuit, those cases relied upon by defendants in which a party to a litigation was ordered to disclose the names of its members are inapplicable. *See, e.g., National Organization for Women* v. *Sperry Rand Corp.*, 88 F.R.D. 272 (D. Conn. 1980) (plaintiff ordered to disclose the names of its *own* members). The court's holding in *Sperry Rand* — that, by bringing the suit, plaintiffs at least partially waived any right to privacy they otherwise had, *id.*, at 275, — is inapplicable to this case because the women scheduled for abortions did not bring suit and thus did not waive their constitutional right to privacy.[8] Indeed, an action, such as here, for prospective injunctive relief under a state civil rights statute by a state attorney general (who could have been the sole plaintiff in this case[9]) is fundamentally different from a damages case such as *Sperry Rand*. And the premise of *Sperry Rand* — that by suing for

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[7] The following finding by the trial judge reflects an example of a woman patient who was obviously "coerced" under the MCRA, whom it is outlandish to think would give helpful evidence to Petitioners, and whom it would have been unthinkably cruel to force to appear at trial.

> 267. One patient was suffering the involuntary termination of a wanted pregnancy and was bleeding. She was at the [clinic] to have the non-viable fetus removed. The [clinic] staff made arrangements for her to be taken to the Brigham and Women's Hospital for emergency treatment because the defendants' actions prevented the procedure from being performed at the [clinic] that day. (A. Vol. II, pp. 467-8).

[8] Women's constitutional right to choose abortion confidentially would be a very weak right if it could be waived by someone else's decision to commence a lawsuit.

[9] For that reason, the SJC did not address the issue of the clinics' and physician's standing. Petition, A6-7.

damages, plaintiffs waive their privacy rights — does not apply to a public enforcement action such as this became when the Massachusetts Attorney General intervened. The prosecution of such an action by a state attorney general cannot waive privacy rights of third parties, much less privacy rights of constitutional dimension.

Petitioners' claim of denial of due process at trial is nothing more than a variation on the same "discovery" argument, and flawed for the same reasons.[10] Petitioners' were well aware of the names of their accusers (the named plaintiffs and the plaintiff-intervenor: the clinics and the Attorney General), and Petitioners' had every opportunity to cross-examine the source of information for all evidence presented to the court (in the case of witnesses' testimony as to patients' observable physical reactions to defendants' conduct, the source of information was the testifying witness). Petitioners in this case were not denied discovery on any "crucial issue," nor were they denied due process.[11]

C. *The Information Sought By Defendants Is Constitutionally Protected.*

Women have a constitutional right to choose abortion confidentially and Petitioners' attempts to obtain the identities of women scheduled for abortions squarely contravenes that right. *See Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 80, 118 (1976); *Bellotti* v. *Baird*, 443 U.S.

[10] For example, defendants' reliance on *Western Electric Co., Inc.* v. *Stern*, 544 F.2d 1196 (3rd Cir. 1976) is misguided for the same reasons as is defendants' reliance on *Sperry Rand* in support of its discovery arguments. At issue in *Western Electric* was the discovery of the allegations of discrimination by members of the *plaintiff class* seeking victim-specific damages, whereas here defendants sought the identities of women patients who were not parties to this litigation.

[11] The hollowness of Petitioners' position is reflected in their claim that "[d]iscovery of all relevant information is the cornerstone of our judicial system . . ." Petition, 19 n.9. There has probably never been a case in which "all" relevant information has been discovered. Balancing relevance against burden is the everyday business of trial courts, and hardly of constitutional dimension.

622, 644 (1979); *Whalen* v. *Roe*, 429 U.S. 589, 600 (1977) and notes 23-25 (1977); *Planned Parenthood League of Mass.* v. *Operation Rescue, supra*, 550 N.E.2d at 1365. *See also Planned Parenthood of Southeastern Penn.* v. *Casey*, ____ U.S. ____, 112 S.Ct. 2791, 2832 (1992) (disclosure and reporting of abortion-related information must "properly respect a patient's confidentiality and privacy" and ensure that "the identity of each woman who has had an abortion remains confidential") (citations omitted). Women who visit abortion clinics and provide confidential information do so with the constitutionally-protected expectation that it will be used only by clinic personnel for medical purposes and not given to third parties, particularly those who are adamant in their opposition to abortion.[12]

II. The Injunction Does Not Violate The First Amendment

The permanent injunction prohibits only physical conduct and activity: "trespassing on, blocking or in any way obstructing access (either ingress or egress) to any facility . . . which provides abortion counselling or services."[13] Petitioners' challenge to these words on First Amendment overbreadth grounds is misplaced.

The words "or in any way obstructing access" do not create an issue of overbreadth. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973) (when a statute regulated "conduct" as

[12] The SJC noted that the trial judge "fulfilled the Supreme Court's expectations", reflected in *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977), that trial judges would "protect attempts at unwarranted disclosures for evidentiary purposes." Petition, A14, n.11. Disclosing an abortion patient's identity to an abortion clinic blockader would obviously be a "substantial obstacle to [that] woman's exercise of the right to choose." *Planned Parenthood of Southern Penn.* v. *Casey*, ____ U.S. at ____, 112 S.Ct. at 2821.

[13] That injunction (in its virtually identical preliminary injunction form) has already been applied to two of the original defendants in this case, who violated it by ***physical*** conduct. *Commonwealth* v. *Cotter*, 612 N.E.2d 1145 (Mass. 1993), and *Commonwealth* v. *Brogan*, 612 N.E.2d 656 (Mass. 1993). Brogan is one of the Petitioners.

opposed to "speech", its "overbreadth . . . must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."); *New York* v. *Ferber*, 458 U.S. 747, 773 (1982) (upholding state prohibition on child pornography, and noting that Court would not "assume that the New York courts will widen the possibly invalid reach of the statute . . ."). *See also National Organization of Women, Inc.* v. *Scheidler*, ____ U.S. ____, 114 S.Ct. 798, 807 (1994) (Souter, concurring) (no First Amendment reason to read an economic motive requirement into application of RICO to abortion clinic blockaders, because no reason to prevent RICO from applying to "acts of violence we need not fear chilling"). Petitioners turn traditional rules of construction on their head by arguing that these words "must be construed to include . . . nonphysical confrontation." Petition, 21. To the contrary, the injunction should be construed to *prevent*, not create, a constitutional issue, which means it must be construed to exclude speech-protected activities, and this Court, at this stage, must assume that the Massachusetts courts will adopt such a construction.[14]

Moveover, one can envision physical activities that would impede or prevent clinic access that might not involve "blocking access" (e.g., severing utilities or throwing "stink bombs" through windows), but that would involve "obstructing access". If the prohibition against "obstructing access" burdens speech at all, which Responsents do not concede, it does so less than a "36 foot buffer zone around clinic entrances and driveways" recently upheld by this Court as "burden[ing] no more speech than necessary to accomplish the governmental interest at stake.". *Madsen* v. *Women's Health Center, Inc.*, ____ U.S. ____, 62 U.S.L.W. 4686, 4690 (June 30, 1994) (Rehnquist, C.J.) (also noting, at 4690, the state's

[14] *See*, in the context of interpretation of legislation, *New York* v. *Ferber*, 458 U.S. 747, 768 (1982) (Court allows state court the opportunity to construe a law to avoid constitutional infirmities); *Time, Inc.* v. *Hill*, 385 U.S. 374, 397 (1967) (Court assumes that state court will construe statute "to avoid invasion of the constitutional protections of speech and press").

"strong interest[s]" implicated by targeted picketing of abortion clinics). *See also Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) (upholding prohibition of picketing in front of courthouse interfering with free ingress and egress).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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FILED
AUG 18 1994
OFFICE OF THE CLERK

No. 94-52

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

KEVIN BLAKE, SEAN BROGAN, MARY KELLIHER, JOHN D. McCARTHY and MORTIMER O'SHEA,
Petitioners,

v.

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC., COMMONWEALTH OF MASSACHUSETTS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in this civil action, certain discovery and evidentiary orders protecting the identities of non-testifying abortion clinic patients from disclosure to petitioners who had blockaded and invaded the clinics resulted in the denial of petitioners' right to a fair trial under the Due Process Clause.

2. Whether the permanent injunction, which bars petitioners from "trespassing on, blocking or in any way obstructing access" to abortion clinics, violates the First Amendment.

LIST OF PARTIES

The petitioners in these proceedings are Kevin Blake, Sean Brogan, Mary Kelliher, John D. McCarthy, and Mortimer O'Shea. The respondents are the Commonwealth of Massachusetts; Planned Parenthood League of Massachusetts, Inc.; Preterm, Inc.; Repro Associates, Inc.; Crittenton Hastings House; and Stanton P. Goldstein, M.D.

The parties to the proceedings before the Supreme Judicial Court of Massachusetts included the parties to this proceeding and fictitious plaintiff Rebecca Roe, as to whom the action was dismissed.

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On Petition For a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

---

RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondent Commonwealth of Massachusetts (the "Commonwealth") submits this brief in opposition to the petition for writ of certiorari ("Pet.").

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (the "Supreme Judicial Court") is reported at 417 Mass. 467, 631 N.E.2d 985 (1994), and is reproduced at Appendix A to the petition. ("Pet. App.") The Amended Judgment of the Superior Court and the Amended Permanent Injunction were not reported and are reproduced at Pet. App. A.19-A.22 and A.23-A.24. In addition, the Superior Court issued a 150-page unreported decision. See appendix to petitioners' brief in the Supreme Judicial Court, volume II, pp. 397-546. (Hereinafter cites to the record will be designated "A., vol., p." and cites to the Superior Court decision, "d., A. vol., p.").

JURISDICTION

The opinion of the Supreme Judicial Court was entered on April 11, 1994. Pet. App. A.1. The petition was filed July 6, 1994 and received by the Commonwealth on July 7, 1994. The petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1257(a) (1988). The Commonwealth contends that this Court lacks jurisdiction over the second Question Presented because petitioners failed to preserve the issue adequately for review by this Court. Pursuant to Sup. Ct. R. 30.3, the time for filing this brief was extended until August 18, 1994.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This action involves the Massachusetts Civil Rights Act (the "MCRA"), Mass. Gen. L. ch. 12, § § 11H, (1992), which provides, in pertinent part, as follows:

> **§11H Violations of constitutional rights; civil actions by attorney general; venue**
>
> Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable

> relief in order to protect the peaceable exercise or enjoyment of the right or rights secured.

In addition, the petition invokes the First and Fourteenth Amendments to the United States Constitution, which are accurately set forth in the petition. Pet. 2-3.

STATEMENT OF THE CASE

An accurate statement of the case appears at Pet. App. A.3-A.6 (opinion of the Supreme Judicial Court). The petition, however, mischaracterizes this public enforcement action and the discovery and evidentiary rulings at issue. As to those subjects, the Commonwealth states as follows.

In March, 1990, the Commonwealth of Massachusetts, through its Attorney

General, intervened in this civil action in response to a persistent, statewide campaign by petitioners, along with Operation Rescue: Boston and others, physically to prevent women from exercising their constitutional rights to obtain abortion counseling and services. A., I, 10; d., A, II, 399. In the Complaint for Injunctive Relief, the Attorney General asserted a single state law claim under Mass. Gen. L. ch. 12, § 11H (1992) against two organizational defendants -- Operation Rescue: Boston and the Pro-Life Action Network of Arlington ("P.L.A.N.") -- and numerous individual defendants, including the petitioners, who repeatedly had blockaded and/or

physically invaded clinics around the Commonwealth. A., I, 90-142. In October, 1990 the private plaintiffs (the "respondents") joined the Attorney General in filing a Joint Amended Complaint stating a single claim under the MCRA. Prior to trial, the respondents dropped their claim for damages and attorney's fees, and this case became primarily a civil enforcement action seeking a permanent, criminally enforceable injunction in accordance with Mass. Gen. L. ch. 12, §§ 11H-11J. A., I, 244-290. Copies of sections 11I and 11J are attached hereto as Appendix A.

In the 13-day bench trial, the Commonwealth and respondents offered

proof of nine occasions on which petitioners and others had blockaded and/or invaded abortion clinics in the Commonwealth. In prosecuting this action, the Commonwealth did not rely on, or even know the names of, women harmed by petitioners' actions. Rather, the Commonwealth's and respondents' evidence consisted of 22 non-patient witnesses (primarily police officers and clinic personnel) and well over 100 exhibits, including newsletters and other literature produced and distributed by Operation Rescue: Boston and P.L.A.N., A., III, 645-782; photographs and videotapes of each incident proven at trial, e.g., A.III, 581, 616, 634; selected bicycle locks

and homemade locks used by petitioners and others to lock themselves to clinic property, e.g., A., III, 588, 590, 619, 623; and redacted medical records establishing numbers of appointments, delays in service, and cancellations due to petitioners' activities, e.g., A.III, 604-612, 614-615, 624-627, 629-633, 641-644.

In 150 pages of findings and rulings, the Superior Court ultimately found all but one of the individual defendants liable under the MCRA. d., A., II, 504. On October 17, 1991, finding "overwhelming evidence of actions by the defendants which interfered with the ability of women to obtain abortions or related services at

abortion clinics in Massachusetts," d., A., II, 524, the Superior Court entered judgment for the Commonwealth and respondents. The Superior Court thereafter entered the Amended Permanent Injunction, the only relief sought below. Pet App. A.23-A.24.

During pre-trial discovery, only one defendant, Robert Delery, who was a party to neither the appeal nor this petition, sought to discover through interrogatories and document requests to the respondent clinics the identities of women scheduled to receive abortion services on the dates of the clinic blockades and invasions at issue. Much later, on the eve of trial, the petitioners, along with numerous other

non-appealing defendants, served a subpoena and at trial made oral requests for records identifying individuals prevented from receiving abortion services. These requests were denied by the Superior Court and upon interlocutory review to the state appellate courts. Pet. 4.

On appeal, the Supreme Judicial Court affirmed the judgment, the discovery and evidentiary rulings, and the Amended Permanent Injunction in their entirety. Pet. App. 16. In so ruling, the Supreme Judicial Court held that because the Attorney General had "special standing" to bring this action under state law, this case was properly analyzed as a civil public enforcement

action under the MCRA. This petition then followed.

REASONS FOR DENYING THE WRIT

For the reasons set forth below, the two Questions Presented here do not warrant review under Rule 10 of this Court's rules. Neither question rises to the level of an "important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). In addition, this Court lacks jurisdiction over Question No. 2.

I. THE DISPUTED DISCOVERY AND EVIDENTIARY RULINGS RAISE NO IMPORTANT OR UNSETTLED QUESTION OF FEDERAL LAW.

According to the first Question Presented, the Supreme Judicial Court's

decision on the discovery and evidentiary issues "elevat[ed] clinic patients' rights to privacy above petitioners' rights to a fair trial . . . " Pet. i. The decision and the record below, however, do not support such a characterization of the narrow, fact-bound rulings made by the Supreme Judicial Court.

A. The Due Process Question Allegedly Raised by the Discovery and Evidentiary Rulings Was Secondary to the State Law Issues.

The Supreme Judicial Court primarily and appropriately analyzed the discovery and evidentiary dispute as it

had been briefed by the parties[1/] -- as a review of the trial judge's exercise of discretion over discovery and evidentiary disputes under state law. Specifically, the Supreme Judicial Court considered the relevance of the requested information and the likelihood that it would be favorable to the petitioners' defense to the MCRA claim, in light of the weight of the evidence adduced in support of the state civil rights claim. Pet. App. A.11-A.13. This determination was then balanced against the likelihood of intrusion on the patients' constitutional right to privacy. The court held:

[1/] The petitioners themselves devoted only four pages of their 60-page brief before the Supreme Judicial Court to the due process argument.

> Considering the likelihood that the defendants would obtain no evidence materially beneficial to them from women whose lives they intentionally and admittedly disrupted and further considering that disclosure of the identity of these women would intrude into their privacy on a matter of constitutional right, we conclude that the trial court did not abuse its discretion in denying disclosure of the identities of the women affected by the defendants' conduct.

Id., A.13-A.14. The Supreme Judicial Court relegated consideration of the federal due process argument to a single footnote, stating: "For the same reasons, rejection of defendants' discovery attempts did not deny them due process of law." Pet. App. A.14 n. 12.

The Supreme Judicial Court's treatment of the due process argument was entirely appropriate. At trial and

on appeal, the petitioners' only fair trial/due process argument was entirely congruent with their abuse of discretion argument. That is, the petitioners merely sought, and now seek, a fact-bound redetermination of the materiality of the information sought, in light of the evidence adduced at trial of the state law claim.

The first Question Presented, therefore, would have this Court correct the error allegedly made by the Superior Court. Merely arguing that the rulings below were wrong, however, does not justify plenary review by this Court. Sup. Ct. R. 10.1; see also Hamilton Show Co. v. Wolf Bros., 240 U.S. 251, 258 (1916); In re Woods, 143 U.S. 202,

206 (1892). Moreover, as set forth below, no such error was made. See argument II.B, infra.

B. Question 1 Presents No Unsettled Question of Federal Law.

Petitioners claim that the first Question Presented actually raises three unsettled sub-questions:

> what happens when these two rights [due process and privacy] conflict? Do the defendants, in preparing a defense to allegations that they threatened, intimidated or coerced women, have a right to confront the alleged victims and seek relevant information from them? Or, in the name of privacy, can the defendants be found liable under MCRA and be subjected to fines and prison sentences, without even learning whom they allegedly threatened, intimidated or coerced?

Pet. at 11.

Of these three broad questions, the third question, concerning liability under the MCRA, raises an issue under the state law, which does not fall within this Court's jurisdiction. The first and second questions also fail to qualify for review. Even assuming, without conceding, the legitimacy of the petitioners' claim that this case involves a "conflict"[2/] between due process and privacy, the Supreme

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2/Although the petition refers to a "conflict" between constitutional rights, it does not allege any "conflict" within the meaning of Rule 10 -- i.e., no determination of a federal question in a manner that conflicts with another state's highest court, a United States Court of Appeals, or a decision of this Court. Sup. Ct. R. 10.1 (b), (c). In fact, the petition fails to point to a single decision even arguably in conflict with the decision below.

Judicial Court's resolution of the due process claim raises no unsettled federal question about what happens when due process and privacy concerns allegedly conflict.

In fact, the stringent criminal due process analysis applied below has been well-settled for at least several years. In Pennsylvania v. Ritchie, 480 U.S. 39, 57-61 (1987), this Court considered whether the trial court's refusal to compel the Commonwealth of Pennsylvania to produce a confidential file on child abuse violated a criminal defendant's right to a fair trial under the Due Process Clause. The Court reaffirmed the already well-established test for evaluating such claims under the Due Process Clause:

> It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. . . . "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Id. at 57 (emphasis added)(citations omitted). The Court remanded the case for in camera inspection and a materiality determination by the trial court, but refused to allow defense counsel to review the file because of the need to respect the Commonwealth's "compelling interest in protecting its child-abuse information." Id. at 60.

As set forth below, the Supreme Judicial Court here applied the same,

well-established materiality test in rejecting the petitioners' challenge to the withholding of the patients' identities. In fact, the Supreme Judicial Court expressly relied on precedent citing and quoting the Pennsylvania v. Ritchie due process test. Pet. App. A.12-A.13. Accordingly, this Question Presented fails to raise any important, unsettled question of federal law.

II. THE PETITIONERS WERE AFFORDED DUE PROCESS AND A FAIR TRIAL.

A. If Anything, the Supreme Judicial Court Afforded Elevated Protection To Petitioners' Due Process Rights.

By applying the due process standards required in a criminal

proceeding like Pennsylvania v. Ritchie, the Supreme Judicial Court, if anything, applied a more stringent due process analysis than required in this civil action, thus ensuring that petitioners' rights were fully protected. Since in a criminal proceeding there would have been no right to the information sought by the petitioners, there certainly was no such right in this civil action.

B. Patient Identities Were Correctly Withheld under the Pennsylvania v. Ritchie Test for Materiality Under the Due Process Clause.

Even assuming the applicability of the criminal due process test here, the Supreme Judicial Court correctly held that under Pennsylvania v. Ritchie there

was no obligation to compel the information sought by petitioners since it was not "material" and unlikely to be favorable to their defense to the state law claim. Pet. App. A.11-A.13.

First, it is undisputed that the Commonwealth, on whose exclusive standing the Supreme Judicial Court decision was based,[3/] did not even have the information petitioners sought within its possession. As the unchallenged finding of the Supreme Judicial Court stated, the Attorney General "probably did not have any knowledge of which patients were

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3/The Supreme Judicial Court declined to address the standing of private respondents, and proceeded to analyze the case as if the Attorney General were the sole plaintiff. Pet. App. A.6- A.7 & n. 7, A.14 & n. 12.

affected by the defendants' conduct." Pet. App. A.12 n. 10.[4/]

In addition, petitioners have failed to demonstrate that obtaining patients' identities would have produced information both favorable and material

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[4/] For this reason, petitioners' analogy to cases involving use of confidential government informants fails. Pet. 17. First, clinic patients, who are not even known to the Commonwealth, did not supply the Commonwealth with any information relevant to the litigation here. Moreover, even in informant cases, the court must apply a balancing test, deciding "whether the party opposing the [government] privilege [to withhold confidential informants' identities'] has [a] credible need for the information in order to defend itself in the action -- a need greater than the important policy consideration underlying the privilege." Dole v. Local 1942, IBEW, 870 F.2d 368, 373 (7th Cir. 1989). Accord Roviaro v. United States, 353 U.S. 53, 60-61 (1957). As set forth infra, application of a similar materiality test demonstrated no such need here.

to their defense. At most, they claim that such disclosure would have assisted in identifying individual women who reacted positively to the petitioners' actions. Under state law, however, the Commonwealth's case neither required nor depended on the testimony of individual injured patients nor proof of subjective intent. Pet. App. A.11. Rather, state law has established that what constitutes "threats, intimidation or coercion" is determined with reference to an objective standard: that is, "whether a reasonable woman would have felt threatened, intimidated, or coerced by the defendants' conduct." Id.

In this case, moreover, there was no need even to reach the analysis of

patient reactions under the objective test. Petitioners never challenged the Superior Court's finding, upheld on appeal, that the petitioners' physical actions in blockading and invading clinics per se constituted "coercion," defined under state law as "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done." Pet. App. A.9. The findings of coercion constituted an independent and adequate basis for liability under the MCRA. See Pet. App. A.10. Since defendants' conduct per se resulted in "coercion" under the MCRA, there was no need to inquire into the nature of

patient reactions. The patient testimony sought by petitioners has no relevance to this coercion analysis.

Finally, even assuming that the petitioners' hypothesized reactions of clinic patients were relevant to determining whether a reasonable woman would have felt "threatened" or "intimidated," petitioners failed to show any likelihood that the result of the proceeding would have been different had disclosure been allowed. As the Supreme Judicial Court correctly held:

> Although the defendants' relevancy contention is theoretically sound, in the circumstances of this case, it lacks practical plausibility. The number of trespasses, the scores of scheduled abortions that were

> impeded, the physical intrusiveness of the blockaders, and the evidence of the reactions of patients and clinic personnel make it unlikely that the defendants would have discovered evidence from these women, whose lives they disrupted, that would have led the trial judge to factual conclusions other than those he reached. In other words, if there had been error on this issue, it would have created no reasonable risk that non-disclosure prejudiced the defendants.

Pet. App. A.12-A.13 (citing, inter alia, Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987)).

Having concluded that the information sought was not "material" (and thus not subject to compulsory disclosure under Pennsylvania v. Ritchie), the Supreme Judicial Court could have ended its analysis there.

However, the Supreme Judicial Court went further, balancing the petitioners' weak showing of need against the "substantial" intrusion on patients' privacy rights that would have resulted from compelled disclosure. Pet. App. A.13-A.14. Because disclosure likely would have produced "no evidence materially beneficial to [the petitioners]," but would have "intrude[d] into [patients'] privacy on a matter of constitutional right," petitioners had no right to compelled disclosure under the Due Process Clause.

C. The Petitioners Had A Full Opportunity to Cross-Examine Adverse Witnesses And Confront the True Plaintiffs.

Petitioners also claim that the Supreme Judicial Court violated their

due process rights by "refusing to let the defendants know the identities of those making allegations against them," and by "preventing them from confronting the true plaintiffs." Pet. 15, 13. However, "the Commonwealth undertook to prove its case through non-patient witnesses who were present at the protests" and thus "assumed the task of proving threats, intimidation, and coercion without testimony from the women concerning their state of mind." Pet. App. A.9, A.13 (emphasis added). Petitioners thus cannot reasonably argue that they were unfairly denied the right to cross-examine or confront clinic patients at trial because those patients were simply not witnesses at trial. At

most, petitioners' claim amounts to a claim of a constitutional right to discovery. However, even in a criminal trial, "'[t]here is no general constitutional right to discovery.'" Pennsylvania v. Ritchie, 480 U.S. at 59-60 (citation omitted).

Moreover, petitioners did have the opportunity to, and did, cross-examine "those making allegations against them" -- the clinic personnel and the police. In addition, petitioners failed to take advantage of the numerous opportunities to challenge and defend against the allegations that their conduct was threatening, intimidating and coercive. They failed to depose clinic staff and police witnesses about their

observations of the clinic invasions and blockades, to seek redacted medical records which might have contained information on patient reaction and scheduling delays, and to call as friendly witnesses any of the "prayer supporters" or other sympathizers who attended these events.

The parties and the Superior Court, moreover, recognized throughout that <u>if</u> the respondents or the Commonwealth had intended to call any patient as a witness at trial, the petitioners would have had the right to depose the patient/witness before trial. This understanding was reflected in the Superior Court's protective order of March 7, 1991, requiring respondents

to notify petitioners "of the existence of any clinic patients who will be called as witnesses and to make them available for deposition by the defendants." A., II, 349-351 (emphasis supplied). Since no clinic patients were called at trial, none was required to be made available for deposition by the petitioners.

Finally, petitioners are incorrect in characterizing the decision below as shielding the identities of the "real" or "true" plaintiffs. Pet. 13, 19, No one disputes that under state law the Attorney General has standing to maintain this action as a plaintiff under Mass. Gen. L. ch. 12, § 11H. Section 11H grants the Attorney General

"special standing" to bring civil rights actions like this one "solely to protect against future unlawful conduct that would be harmful to persons not currently identifiable". Pet. App. A.14.

Accordingly, the Supreme Judicial Court correctly found that an action for injunctive relief, like this one brought by the Attorney General, is fundamentally different from a private claim for damages, in which counterbalancing privacy rights may be analyzed differently. As a result, the Supreme Judicial Court rejected as irrelevant the very cases cited again in this petition, National Org. for Women v. Sperry Rand Corp., 88 F.R.D. 272 (D. Conn. 1980) and Western Elec. Co., Inc.

v. Stern, 544 F.2d 1196 (3d Cir. 1976), stating:

> We need not reach the question whether affected women who bring an action have a constitutional right to have their identities (and the fact that they had been pregnant and decided to obtain an abortion) kept in confidence in an injunction case like this. If this were an action seeking relief for harm done to an individual plaintiff or to a class of plaintiffs, the defendants' entitlement to information about those individuals would be quite different from their entitlement here.

Pet. App. A. 14 n. 12 (citing Western Elec. and Sperry Rand). Accordingly, the Supreme Judicial Court correctly upheld the balance of due process and privacy rights struck below and found no violation of due process here.

III. THIS COURT LACKS JURISDICTION OVER THE SECOND QUESTION PRESENTED, WHICH NEITHER WARRANTS REVIEW BY THIS COURT NOR MAKES OUT A CLAIM UNDER THE FIRST AMENDMENT.

A. Petitioners Failed to Preserve Their Challenge Under the First Amendment.

The second Question Presented objects, on First Amendment grounds, to the wording of clauses (a) and (c) of the Amended Permanent Injunction, which forbid the petitioners and others "in active concert or participation with them" from "trespassing on, blocking or in any way obstructing access to abortion clinics." Pet. i. Although, as the petitioners state, this First Amendment argument was unsuccessfully raised in an earlier appeal to the Supreme Judicial Court, Planned

Parenthood League of Mass. v. Operation Rescue, 406 Mass. 701, 550 N.E.2d 1361 (1990), in the subsequent proceedings the petitioners failed adequately to raise the First Amendment objections raised here. At the trial level, the petitioners failed to raise any First Amendment objections to the wording of the injunction. In addition, on appeal to the Supreme Judicial Court, except for a cursory footnote referencing their earlier First Amendment argument, the petitioners raised a limited First Amendment challenge only to paragraph (c) of the injunction, enjoining them from "directing, instructing, conspiring with and/or [sic] aiding or abetting directly or indirectly any person,

persons, groups or organizations who engage in any of the acts described in paragraphs (a) and (b)." The Supreme Judicial Court, in a finding apparently unchallenged here, correctly noted that "the defendants did not raise it [their first amendment challenge to paragraph (c)] in the trial court," and "do not dispute the plaintiffs' assertion that the defendants had opportunities to raise this challenge and did not do so." Pet. App. A.15 n. 14. Although the Supreme Judicial Court nonetheless considered the issue and affirmed the wording of paragraph (c), the Question has not been adequately preserved for review by this Court.

B. The First Amendment Issue Is Neither Important Nor Unsettled And Was Correctly Decided by the Supreme Judicial Court.

Citing only to the dissent to the Supreme Judicial Court decision below, the petition resorts to an almost verbatim recitation of the dissent's objections to paragraphs (a) and (c). See Pet. App. A.17-A.18 (O'Connor, J., dissenting). Without citing a single federal case, or even mentioning the overbreadth doctrine, petitioners merely make the general claim that the injunction "offends the Constitution" because it will deter reasonable persons from joining others in a public way adjacent to a clinic and picketing, praying, chanting, and exhorting others

to accept their viewpoint. Pet. at 20-21. In addition, they claim, the inclusion of the term obstructing access "in any way" "must" be construed to include hindrance of access to clinics by nonphysical confrontation. Pet. at 21.

This Question, however, raises no important, unsettled federal question. Any First Amendment issue in this case was conclusively settled by Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516 (1994), which upheld an injunction including a 36-foot buffer zone, in which individuals were prohibited from "congregating, picketing, patrolling, demonstrating or entering" any portion of the public right of way around an

abortion clinic, because it "burdens no more speech than necessary to accomplish the governmental interest in providing access to the clinic and facilitating an orderly traffic flow on the street." Id. at 2528.

Before this broad injunction was upheld, the trial court in Madsen had issued what proved to be a less effective injunction, without a buffer zone, prohibiting inter alia, "blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic." 114 S. Ct. at 2522 (emphasis added). This Court expressly noted that this original injunction (including the

"in any other manner" language) was "a much narrower injunction." Id. at 2527.

The injunction in this case, like the original injunction in Madsen, is much narrower than that including the 36-foot buffer zone, which the Court has found constitutionally permissible. It prohibits only those physical actions that directly prevent patients from gaining physical access to a clinic. It therefore burdens no more speech than necessary to accomplish the governmental interest in providing access to the clinics in Massachusetts.

Moreover, the petitioners have failed even to make out the basic elements of a challenge to the injunction under the First Amendment.

Rather, they ask this Court to invalidate the injunction based on the possibility that, at some future date, it may be incorrectly applied. This Court, however, refuses to invalidate injunctions based merely upon "an abstract controversy over the use of . . . words," such as petitioners urge here. 114 S. Ct. at 2530.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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Date: August 18, 1994

DP1/496

12:11I. Violations of constitutional rights; civil actions by aggrieved persons; costs and fees.

Section 11I. Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

12:11J. Violations of constitutional rights; temporary restraining orders and injunctions; violations; punishment; vacation of order.

Section 11J. In actions brought pursuant to section eleven H or eleven I, whenever the court issues a temporary restraining order or a preliminary or permanent injunction, ordering a defendant to refrain from certain conduct or activities, the order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.

After any such order has been served upon the defendant, any violation of such order shall be punishable by a fine of not more than five thousand dollars or by imprisonment for not more than two and one-half years in a house of correction, or both such fine and imprisonment; provided, however, that if bodily injury results from such violation, the violation shall be punishable by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both.

The clerk shall transmit two certified copies of each such order issued under section eleven H or eleven I to each appropriate law enforcement agency having jurisdiction over locations where such defendant is alleged to have committed the act giving rise to the action, and such law enforcement agency shall serve one copy of the order upon such defendant. Unless otherwise ordered by the court, service shall be by delivering a copy in hand to the defendant. Law enforcement agencies shall establish procedures adequate to ensure that all officers responsible for the enforcement of the order are informed of the existence and terms of such order. Whenever any law enforcement officer has probable cause to believe that such defendant has violated the provisions of this section, such officer shall have the authority to arrest said defendant.

Following the final disposition of a criminal contempt proceeding initiated by the attorney general for violation of an order issued in an action brought by the attorney general under section eleven H, the commonwealth shall move to dismiss any charges brought under this section against such defendant for such violation of the order.

Whenever the court vacates a temporary restraining order or a preliminary or permanent injunction issued under section eleven H or eleven I, the clerk shall promptly notify in writing each appropriate law enforcement agency which had been notified of the issuance of the order and shall direct each such agency to destroy all record of such vacated order, and such agency shall comply with such directive.